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## CONSUMER PRODUCT SAFETY: PREEMPTION, THE COMMERCE CLAUSE AND STATE REGULATORY AUTHORITY

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### I. INTRODUCTION: FEDERALISM AND THE POWER TO REGULATE CONSUMER PRODUCT SAFETY

A STATE HEALTH OFFICIAL is assigned to remedy a recurrent poisoning problem: children ingesting highly toxic household cleaning products. The official determines that certain of these products are needlessly toxic; they would be equally effective with far less dangerous concentrations of poisonous ingredients. The official advises the state government to limit by law the permissible toxicity of such products sold within the state. Assuming the accuracy of the official's findings, has the state government the power to remove toxic products from the market? May the state condition marketing within the state on compliance with requirements as to the contents or labeling? Although the state's constitution and legislation may purport to authorize such regulation, the state government's authority can be limited by the actions or powers of the federal government even in the areas of health and safety regulation. Such limits are the focus of this article.

When the thirteen original colonies adopted the Federal Constitution in 1789, they granted a series of enumerated powers to the new federal government.<sup>1</sup> This list of specific powers was augmented by three less specific provisions further defining the division of authority between the federal government and the governments of the states: the necessary and proper clause gives Congress the power to

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1. See U.S. CONST. art. I, § 8, cls. 1-17. In addition to the enumerated powers in article I, other provisions of the Constitution confer various powers upon Congress. See, e.g., *id.* art. III, § 1 (the power to establish inferior federal courts); *id.* art. IV, § 3 (the power to admit new states and regulate territories); *id.* art. V (the power to propose and ratify amendments to the Constitution). Such provisions, however, are not relevant to the present analysis.

enact laws "necessary and proper" for carrying out the enumerated powers of the federal government;<sup>2</sup> the supremacy clause declares constitutionally enacted federal laws to be "the supreme Law of the Land," state law to the contrary notwithstanding;<sup>3</sup> and the tenth amendment explicitly reserves to the states or to the people all governmental power neither granted to the federal government nor prohibited to the states by the Federal Constitution.<sup>4</sup>

These provisions are the framework for determining the allocation of power between state and federal governments. The result is a system with areas of overlapping authority, exercised by both federal and state governments, and areas of exclusive authority, exercised by either the federal government or the state governments, but not both. Confusion regarding which are areas of permissible overlap and which of exclusivity is not new: beginning with *Gibbons v. Ogden*<sup>5</sup> in 1824, the United States Supreme Court has been called upon to resolve scores of conflicts involving questions of federal and state regulatory authority.<sup>6</sup>

In recent years, a new potential battleground for competitive systems of regulation has emerged: the area of consumer product safety regulation. Both the federal government and some state governments have enacted statutes purporting to authorize the regulation of con-

2. *Id.* art. I, § 8, cl. 18. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The necessary and proper clause provides that Congress shall have power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

3. U.S. CONST. art. VI, cl. 2. The supremacy clause provides as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

4. *Id.* amend. X. See *National League of Cities v. Usery*, 426 U.S. 833 (1976). The tenth amendment provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

5. 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, the Supreme Court held invalid a New York statute which prohibited vessels licensed by the United States from navigating the territorial waters of New York unless they were also licensed by the state of New York. *Id.* at 1-3, 221. In the course of his opinion for the Court, Chief Justice Marshall noted that "[i]n our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise." *Id.* at 204-05.

6. See, e.g., *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371 (1978); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962); *Gulf, Colo. and S.F. Ry. v. Hefley*, 158 U.S. 98 (1894). See also cases cited note 59 *infra*.

sumer product safety.<sup>7</sup> The state laws are enacted pursuant to the states' authority to promote and protect the public health, safety, and welfare derived from the police powers inherent in the sovereignty reserved to the states by the tenth amendment of the Federal Constitution.<sup>8</sup> The most sweeping federal legislation was adopted within the past ten years.<sup>9</sup> Enacted pursuant to the enumerated federal power to regulate interstate commerce,<sup>10</sup> the federal law centralizes regulatory authority over product safety by the creation of a single federal agency, the Consumer Product Safety Commission (CPSC or Commission).<sup>11</sup>

Upon creation of the CPSC, the federal government had been expected to occupy the area of consumer product safety rapidly. However, the disappointing inactivity of the Commission in its early years has prompted a reassertion of state regulatory authority. Now,

7. See notes 9 & 12 *infra*.

8. See note 4 and accompanying text *supra*. For cases demonstrating the Supreme Court's recognition of these residual powers, see, e.g., *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203-05 (1824). In *Huron*, the Court upheld a city pollution control law in the face of argument that a federal licensing law had preempted the field. 362 U.S. at 444-48. In so holding, the Court stated: "[T]he Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'" *Id.* at 443-44, quoting *Sherlock v. Alling*, 93 U.S. 99 (1876).

Whether the tenth amendment's reservation of power to the states has substantive effect is unclear. The Justices of the Supreme Court split on this theoretical issue in *National League of Cities v. Usery*, 426 U.S. 833 (1976). In *Usery*, the Court held that the minimum wage requirements of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976), could not be applied to protect state employees because to do so would "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions . . ." 426 U.S. at 852. Writing for the Court, Justice Rehnquist maintained that the tenth amendment is "an affirmative limitation on the exercise of . . . [the] power [of Congress] . . ." *Id.* at 841-44. In a lengthy dissent joined in by Justices White and Marshall, however, Justice Brennan stated that "[t]he amendment states but a truism that all is retained which has not been surrendered." *Id.* at 862 (Brennan, J., dissenting), quoting *United States v. Darby*, 312 U.S. 100, 124 (1941). Although neither opinion had the clear support of a majority on this point, see *id.* at 856 (Blackmun, J., concurring); *Id.* at 880-81 (Stevens, J., dissenting), for the purposes of this article, whether the exact constitutional explanation for the states' power is an omission from article 1 or the affirmation of the tenth amendment is irrelevant; the analysis of Mr. Justice Rehnquist's opinion for the Court in *Usery* is therefore adopted.

9. The principal consumer product safety law, adopted in 1972, is the Consumer Product Safety Act, Pub. L. No. 92-573, §§ 1-34, 86 Stat. 1207 (1972) (current version at 15 U.S.C. §§ 2051-2081 (1976)). The oldest federal consumer product safety law enforced by the Consumer Product Safety Commission is the Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (1976), enacted in 1953. Pub. L. No. 88-164, §§ 1-13, 67 Stat. 111 (1953). See Jackson, *The Subject was Standards: The Federal Government and Safety in the 1940's—and 1970's*, 10 AKRON L. REV. 185, 195 & n.59 (1976).

10. U.S. CONST. art. I, § 8, cl. 3. The commerce clause confers upon Congress the power "[t]o regulate Commerce with foreign Nations and among the several States . . ." *Id.* See text accompanying note 1 *supra*.

11. 15 U.S.C. § 2053(a) (1976).

side by side with the new federal scheme are several equally new but disparate state laws dealing with particular consumer product safety issues, such as hazardous substances, flammable fabrics, poison prevention, and refrigerator safety.<sup>12</sup> But advocates of the new state regulatory initiatives have been confronted by confusing interpretations of the limits on state authority imposed by federal powers and actions, including those imposed by the extensive and unusually complex preemption provisions of the Consumer Product Safety Act (CPSA), as amended,<sup>13</sup> and related statutes.<sup>14</sup> Thus, when the Colorado Department of Health was considering regulation of toxic drain cleaners, it was advised by the state's law department that federal legislation prohibits *any* state labeling requirements even though the opinion also recognized that express federal preemption of state requirements was limited to those requirements which differ from existing federal agency regulations.<sup>15</sup>

The confusion regarding the limits on state authority to regulate consumer product safety is also apparent from the CPSC's own difficulty in defining those limits. For instance, when an advisory opinion was requested in mid-1978 on the issue whether state regulations requiring lighting for bicycles ridden at night had been preempted, the

12. For a table summarizing state product safety laws enacted as of 1979, see U.S. CONSUMER PROD. SAFETY COMM'N ANN. REP. 149-50 (1979). For an example of such a state statute, see COLO. REV. STAT. § 25-5-5082(b) (1973) (authorizing executive director of state department of health to remove from commerce products which pose a hazard "such that labeling adequate to protect the public health and safety cannot be devised" or which present an imminent threat to public health and safety). For a discussion of federal statutes and regulations covering some of the same items, see notes 36-41 & 54-57 and accompanying text *infra*.

13. 15 U.S.C. §§ 2051-2081 (1976). For the text of the preemption provisions of the CPSA, see note 70 and accompanying text *infra*.

14. See notes 36-41 & 65 and accompanying text *infra*. The confusion about the extent of the federal preemption of state regulation intended by Congress was reflected in the case of *Kaiser Aluminum & Chem. Corp. v. United States Consumer Prod. Safety Comm'n*, 574 F.2d 178, 181 (3d Cir.), *cert. denied*, 441 U.S. 322 (1978). In *Kaiser*, the district court had interpreted the legislative history of the CPSA to exclude implicitly from preemption state regulation of products used in residential building construction and affected by local building codes. *Kaiser Aluminum & Chem. Corp. v. United States Consumer Prod. Safety Comm'n*, 414 F. Supp. 1047, 1059-60 (D. Del. 1976) (on motion for preliminary injunction enjoining the application of CPSC regulations). The district court, in its subsequent hearing on the merits, held that the CPSC lacked jurisdiction over aluminum home wiring. *Kaiser Aluminum & Chem. Corp. v. United States Consumer Prod. Safety Comm'n*, 428 F. Supp. 177, 181-82 (D. Del. 1977). The court of appeals reversed, holding that the inconclusive legislative history was insufficient to overcome the plain meaning of the CPSA, rendering such a product subject to CPSC regulation. 574 F.2d at 181-82.

15. Memorandum of law submitted by Michael Huotari, Colorado Department of Law, Human Resources Section, to the Director of the Colorado Department of Health (January 17, 1977) (on file with the authors and at the Villanova Law Review office). The memorandum recommends that the health department petition the CPSC for permission to impose labeling requirements irrespective of whether the targeted products are subject to CPSC safety standards. *Id.* at 2-3.

Commission took several months to prepare and approve its advisory opinion, finally issued in September, 1978, which concluded that the federal regulations would not preempt the state requirements.<sup>16</sup> In January, 1979, the Commission responded to industry dissatisfaction with its 1978 position by issuing a new opinion which "clarifie[d] and supplement[ed]" the earlier one.<sup>17</sup> This opinion conditionally reaffirmed that certain lighting requirements were not preempted, but added and emphasized a new, narrower basis for that conclusion not even hinted at in the Commission's earlier opinion.<sup>18</sup>

Even if the CPSC becomes more active in the coming years, issues of federalism in this area are likely to persist. As the conflicts

16. See Consumer Prod. Safety Comm'n Advisory Op. No. 270 (Sept. 12, 1978) (on file with the authors and at the *Villanova Law Review* office). The opinion was issued in response to a letter dated July 4, 1978 from Mr. A. Fred DeLong, Technical Editor of *Bicycling Magazine*, asking "whether the Commission's bicycle regulation would preempt a state requirement for lighting on bicycles ridden at night." *Id.* The Commission explained its opinion as follows:

The Commission believes that such a lighting requirement protects cyclists against at least two risks of injury. One is inadequate nighttime visibility of bicycles to cars. The other is obstacles in the road that may not be visible to a cyclist at night.

Because the Commission's reflectivity requirements do not address the second risk, we believe that a state lighting requirement for bicycles ridden at night would not be preempted. Under the Federal Hazardous Substances Act, preemption applies only if (a) the Commission has established a requirement to protect against a risk of injury associated with a product and (b) a state's non-identical requirement is applicable to the same product and is designed to protect against the same risk. Although reflectors and lights address one risk of injury that is the same, the total risk addressed by lights is not the same as that addressed by reflectors.

*Id.*

17. See Consumer Prod. Safety Comm'n Advisory Op. No. 270A at 2 (Jan. 16, 1979) (on file with the authors and at the *Villanova Law Review* office). The second opinion was issued in response to a letter dated October 19, 1978 from the Bicycle Manufacturer's Association of America and Schwinn Bicycle Company requesting withdrawal of the first opinion. *Id.* at 1. While the Commission made clear that it was "not withdrawing that opinion," it nevertheless asserted that "further discussion . . . [was] needed." *Id.*

18. *Id.* In its second opinion the Commission began by emphasizing that its first opinion was "based on the assumption that the state or local bicycle lighting requirement at issue would address a different risk(s) of injury than the one the Commission has addressed." *Id.* at 2. The Commission, however, added a new ground for finding no preemption in the following argument:

Our September 12 opinion should have included some additional discussion about the preemption question that your letter raised. The requirement you described, for lighting on bicycles ridden at night, is clearly one which defines how a consumer must use a bicycle. In contrast, the Commission's regulation sets requirements which a bicycle must meet when introduced into interstate commerce. Because the Commission's regulation does not define how a consumer may or may not use a bicycle, the Commission believes that the Federal Hazardous Substances Act does not prohibit states or localities from issuing or enforcing a requirement that lighting be used on bicycles ridden at night.

Please note that this advice concerning a "use" requirement is based on an assumption. For the purpose of answering your question, we have assumed that the state or local requirement would not have the effect of setting any requirement which a bicycle must meet at the time it enters interstate commerce. In addition, since specific state bicycle lighting "use" requirements can vary, the preemption questions raised by each one should be evaluated on an individual basis.

*Id.* (emphasis in original).

over bicycle regulation suggest, the preemptive effect of the CPSA and related statutes<sup>19</sup> is unclear even in fields actively regulated by the Commission. Moreover, although the states may have hesitated to regulate consumer product safety in the early 1970's because the federal legislation had only recently been enacted, they now seem to be growing restless awaiting federal "study" of hazardous products.<sup>20</sup>

The purpose of this article is to explore the limits on state authority to regulate consumer product safety imposed by 1) the new federal consumer product safety legislation,<sup>21</sup> and 2) the constitutional grant to the federal government of the power to regulate interstate commerce.<sup>22</sup> The starting point for this analysis will be the federal legislation, primarily the CPSA, which contains Congress' pronouncement on the effect of federal regulation in the field.<sup>23</sup> As previously noted, the CPSA is commerce clause legislation.<sup>24</sup> In the regulation of interstate commerce, where the federal government has explicit constitutional authority to regulate, that power carries with it the authority to enact statutes limiting or totally abrogating state power in the area regulated.<sup>25</sup> Thus, our examination will suggest areas of regulatory authority from which the states are clearly excluded by the express language of the federal legislation.<sup>26</sup>

The CPSA's preemption language, which appears comprehensive, in fact contains its own explicit limitations, with the result that many areas of potential state regulatory activity have not necessarily

19. See notes 36-41 and accompanying text *infra*.

20. In Connecticut, for example, amidst discussion of proposals to regulate legislatively or ban urea-formaldehyde foam insulation, the State Attorney General reached an extensive agreement with manufacturers for "voluntary" protection of consumers. Joint Press Statement by Attorney General Carl R. Ajello re Urea-Formaldehyde Insulation (Apr. 19, 1979) (press statement and the agreement on file at the Villanova Law Review office). In Colorado, the State Attorney General has sought an injunction against several manufacturers of urea-formaldehyde insulation under the state consumer protection statute to enjoin them from misrepresenting the safety and effectiveness of the insulation. See First Amended Complaint, Colorado v. Rapco Foam, Inc., Civ. No. C-83160 (D. Denver, filed Dec. 4, 1978). In light of a recent resolution adopted by the National Association of Attorneys General, Resolution of the Nat'l Ass'n of Att'ys Gen. (Dec. 1, 1978) (on file at the Villanova Law Review office), urging a moratorium on the use of urea-formaldehyde foam insulation pending further study of its hazards, action in other states is very possible prior to the issuance of a CPSC safety standard.

21. See notes 82-191 and accompanying text *infra*.

22. See notes 192-236 and accompanying text *infra*.

23. See notes 30-81 and accompanying text *infra*.

24. See note 10 and accompanying text *supra*.

25. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209-11 (1824). The Supreme Court stated in *Gibbons* that in any case where acts of state legislatures interfere with or are contrary to the laws of Congress, "the Act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Id.* at 211. For further discussion of *Gibbons*, see note 5 *supra*. See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-23 (1978).

26. See notes 82-133 and accompanying text *infra*.

been preempted by the federal statute.<sup>27</sup> As to areas not explicitly covered by the CPSA or other federal legislative preemption provisions, we must inquire, first, whether the federal legislation preempts state power by implication,<sup>28</sup> and second, whether, in the absence of any finding of implicit congressional preemption, initiatives by state government in the consumer product safety area would impose a greater burden on interstate commerce than is permissible under the commerce clause of the Federal Constitution.<sup>29</sup>

## II. THE FEDERAL LEGISLATION

### A. *An Overview*

The current federal legislative approach to consumer product safety results primarily from the investigation and recommendations of the National Commission on Product Safety (1967 Commission), established by Congress in 1967 to study the "scope and adequacy of measures now employed to protect consumers against unreasonable risk of injuries which may be caused by hazardous household products."<sup>30</sup> Estimating that 20 million injuries and 30,000 fatalities were annually attributable to unsafe products,<sup>31</sup> the 1967 Commission reported that "state and local regulation of consumer products is vitiating by narrow scope, diffuse jurisdiction, miniscule budgets, absence of enforcement, mild sanctions, and casual administration."<sup>32</sup> The report of this Commission recommended the enactment of integrated and comprehensive federal legislation designed to strengthen and coordinate federal control of consumer product safety.<sup>33</sup>

Substantially all of the recommendations<sup>34</sup> were adopted in the CPSA.<sup>35</sup> The CPSA empowers the Commission to administer four existing federal statutes:<sup>36</sup> the Federal Hazardous Substances Act

27. See 15 U.S.C. § 2075 (1976); note 70 *infra*.

28. See notes 137-91 and accompanying text *infra*.

29. See notes 192-236 and accompanying text *infra*.

30. Act of Nov. 20, 1967, Pub. L. No. 90-146 § 2(a), 81 Stat. 466.

31. HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2d SESS., FEDERAL REGULATION AND REGULATORY REFORM 197 (Subcomm. Print 1976) (hereinafter cited as 1976 OVERSIGHT REPORT).

32. NATIONAL COMM'N ON PROD. SAFETY, FINAL REPORT 81 (1970), reprinted in *Consumer Product Safety Act: Hearings Before Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st & 2d Sess. 414 (1971-1972) (hereinafter cited as 1972 House Hearings).

33. See *id.* at 88, reprinted in 1972 House Hearings, *supra* note 32, at 421.

34. See PROPOSED CONSUMER PROD. SAFETY ACT §§ 1-36 (1970), reprinted in NATIONAL COMM'N ON PROD. SAFETY, *supra* note 32, app., reprinted in 1972 House Hearings, *supra* note 32, at 450.

35. Pub. L. No. 92-573, §§ 1-34, 86 Stat. 1207 (1972) (current version at 15 U.S.C. §§ 2051-2081 (1976)).

36. 15 U.S.C. § 2079(a)-(c) (1976).



(FHSA);<sup>37</sup> the Poison Prevention Packaging Act of 1970 (PPPA);<sup>38</sup> the Flammable Fabrics Act (FFA);<sup>39</sup> and the Refrigerator Safety Act (RSA).<sup>40</sup> But the most significant contribution of the CPSC was its expansion of federal control over consumer product safety by giving the CPSC broad authority to regulate, with few exceptions, any "consumer product."<sup>41</sup>

The heart of the CPSC's regulatory authority, section 7,<sup>42</sup> enables the Commission to promulgate consumer product safety standards in the form of either a performance requirement or a labeling requirement.<sup>43</sup> The Commission may initiate rulemaking by notice in the *Federal Register* inviting any "person," including a state, to submit an existing consumer product safety standard as a proposal or to develop new guidelines.<sup>44</sup> This so-called "offeror process" is designed to involve the resources and facilities of both private and public agencies in developing standards;<sup>45</sup> indeed, if the Commission accepts an offer to develop a standard or to participate in its development, the Commission may often help pay the offeror's costs.<sup>46</sup> If

37. *Id.* §§ 1261-1279.

38. *Id.* §§ 1471-1476.

39. *Id.* §§ 1191-1204.

40. *Id.* §§ 1211-1214.

41. *See, e.g.*, 15 U.S.C. § 2056(a) (1976) (empowering the Commission to promulgate rules setting requirements for performance, composition, contents, design, construction, finish, packaging, or labeling of "a consumer product"); *id.* § 2057 (empowering the Commission, under certain circumstances, to ban "a consumer product").

The CPSC defines "consumer products" to mean

any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise . . . .

*Id.* § 2052(a)(1). The statute specifically exempts several types of products covered by other federal regulatory statutes. *See, e.g.*, *id.* § 2052(a)(1)(B) (tobacco products); *id.* § 2052(a)(1)(D) (pesticides); *id.* § 2052(a)(1)(H) (drugs). There is also a general exclusion of products "not customarily" produced or distributed for consumer use. *Id.* § 2052(a)(1)(A). Nevertheless, the definition of "consumer product" has been estimated to cover 10,000 types of products. 1976 OVERSIGHT REPORT, *supra* note 31, at 207.

42. 15 U.S.C. § 2056 (1976).

43. *Id.* § 2056 (a)(1)(A) & (B). The section also provides that "[a]ny requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." *Id.* § 2056(a)(1).

44. 15 U.S.C.A. § 2056(b)(1)(D) (Supp. 1979). The notice must also include the following: 1) an identification of the product and the associated risk of injury, *id.* § 2056(b)(1)(A); 2) a statement of "the Commission's determination that a consumer product safety standard is necessary to eliminate or reduce the risk of injury," *id.* § 2056(b)(1)(B); 3) information concerning any relevant existing standard known to the Commission, *id.* § 2056(b)(1)(C); and 4) the time allowed for the development of a safety standard, *id.* § 2056(b)(1)(E).

45. *See* H. CONF. REP. NO. 1593, 92d Cong., 2d Sess. 47-48 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4596, 4639.

46. *See* 15 U.S.C.A. § 2056(d)(2) (Supp. 1979). In order to be able to contribute to the costs of development, the Commission must first determine that 1) the contribution would result in a

the Commission does not receive an acceptable proposal within the allowed time, it is explicitly authorized to formulate its own standards.<sup>47</sup> Originally, the "offeror process" was the only manner of rulemaking.<sup>48</sup> However, Congress amended the CPSA in 1978,<sup>49</sup> so that in developing a consumer product safety standard, the Commission may bypass the offeror process altogether if it determines that "it is more expeditious for the Commission to develop the standard than to proceed under [the offeror process] for its development."<sup>50</sup> In addition to these means of initiating the rulemaking process, section 10 permits "[a]ny interested person" to petition the Commission for issuance, amendment, or revocation of a safety standard.<sup>51</sup>

Once a consumer product safety standard is in effect, manufacturers or private labelers of such products must furnish any distributor or retailer a certificate verifying that the product is in con-

more satisfactory standard than would be developed otherwise; and 2) the offeror is financially responsible. *Id.*

47. *Id.* § 2056(e).

48. See 15 U.S.C. § 2056(e) (1976) (amended by Pub. L. No. 95-631, §§ 3, 4(a)-(c), 5, 92 Stat. 3742 (1978)). Both before and after the 1978 amendments, section 7(e) provided: 1) if the Commission publishes notice but does not accept an offer, then the Commission may develop its own standard; or 2) if the Commission does accept an offer, it may still develop a proposed standard itself if any of the following conditions occur: a) the time permitted for development has expired, 15 U.S.C.A. § 2056(e)(2)(A) (Supp. 1979); b) "satisfactory progress" in the development of the standard is not being made, *id.* § 2056(e)(2)(B); or c) the sole offer accepted is that of a "manufacturer, distributor, or retailer" of the product to be regulated, *id.* § 2056(e)(2)(C). The 1978 amendments, however, added a new provision which permits the Commission to develop its own standard without following the procedures set out immediately above. 15 U.S.C.A. § 2056(b)(2) (Supp. 1979). For further discussion of this provision, see notes 49-50 and accompanying text *infra*.

49. Act of Nov. 10, 1978, Pub. L. No. 95-631, § 3(b), 92 Stat. 3742 (to be codified at 15 U.S.C. § 2056(b)(2)). The House Report accompanying the amendments indicated the reasons for the changes as follows: "The [Interstate and Foreign Commerce Committee] has long been concerned about the length of time it takes the CPSC to develop safety standards under the offeror process in Section 7 of the [CPSA]. Of equal concern to the committee has been the quality of the standards being produced." H.R. REP. NO. 1164, 95th Cong., 2d Sess. 5 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 9434, 9435.

50. 15 U.S.C.A. § 2056(b)(2) (Supp. 1979). The Commission must first indicate its determination to develop the standard itself in the notice published in the *Federal Register* to commence the development proceeding. *Id.* § 2056(b)(1)(D)(ii)(I). The amendment also specifies that the development of the new standard should take place only "[a]fter consultation with such interested parties as the Commission shall deem necessary." *Id.* § 2056(b)(2). Finally, the Commission's determination that it would be more expeditious to develop the standard itself must take into account the following: 1) the nature of the risk of injury associated with the product; 2) "the expertise of the Commission with respect to [the particular] risk of injury"; 3) "the expertise of the Commission in developing consumer product safety standards"; and 4) "the resources available to the Commission and the priorities established by the Commission." *Id.* § 2056(b)(2)(i)-(iv).

51. 15 U.S.C. § 2059(a) (1976). If the Commission does not grant the petition, the petitioner may bring an action de novo in federal court to compel the Commission to initiate a rulemaking proceeding. *Id.* § 2059(e)(1), (2). The court may, in the interest of justice, award reasonable attorneys' fees and expert witnesses' fees. *Id.* § 2059(e)(4).

formity with the safety standard.<sup>52</sup> The Commission may require that labels include the name of product's manufacturer, the date and place of manufacture, and certification of compliance with pertinent safety standards.<sup>53</sup>

In addition to the power to promulgate safety standards, the Commission has been given other means of protecting the public. The Commission may ban a "hazardous product"—*i.e.*, a product so dangerous that no safety standard would provide adequate protection.<sup>54</sup> If a consumer product can be shown to present an "imminent and unreasonable risk of death, serious illness, or severe personal injury," the Commission may bring an action 1) in rem against the "imminently hazardous consumer product" itself; 2) in personam against any manufacturer, distributor, or retailer of the product; or 3) both in rem and in personam, and seek relief varying from notification of purchasers to seizure and condemnation of the product.<sup>55</sup> Finally, if after a hearing the Commission determines that a product presents a "substantial product hazard,"<sup>56</sup> the Commission may order the manufacturer, distributor, or retailer to take action to remedy the hazard.<sup>57</sup>

52. *Id.* § 2063(a). The certificate must be "based on a test of each product or upon a reasonable testing program," must state the name of the issuer of the certificate, and must include the date and place of manufacture. *Id.* § 2063(a)(1).

53. *Id.* § 2063(c).

54. *Id.* § 2057. In order to declare a consumer product a "banned hazardous product," the Commission must find the following: 1) the product is being, or will be, distributed in interstate commerce; 2) the product "presents an unreasonable risk of injury"; and 3) "no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product." *Id.*

55. *Id.* § 2061. If the action is brought in personam, the court may grant "such temporary or permanent relief as may be necessary to protect the public from such risk." *Id.* § 2061(b)(1). The relief may include "a mandatory order requiring the notification of such risk to purchasers of such product known to the defendant, public notice, the recall, the repair or the replacement of, or refund for, such product." *Id.* For a discussion of notification orders, *see* note 57 *infra*.

If the action is brought in rem against the product, the product "may be proceeded against by process of libel for . . . seizure and condemnation." *Id.* § 2061(b)(2). The statute further directs that the proceedings "conform as nearly as possible to proceedings in rem in admiralty." *Id.*

56. *Id.* § 2064(a). The term "substantial product hazard" is defined to mean

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

*Id.*

57. *Id.* § 2064(c) (1976); 15 U.S.C.A. § 2064(d) (1974 & Supp. 1979). If the Commission determines that notification is necessary to "adequately protect the public," it may order the manufacturer, distributor, or retailer to take any one or more of the following actions: 1) give public notice of the hazard; 2) mail notice to each person who is a manufacturer, distributor, or retailer of the product; or 3) mail notice to "every person to whom the person required to give notice knows such product was delivered or sold." *Id.* § 2064(c). If the Commission determines that further action is "in the public interest," it may order that the manufacturer, distributor, or retailer do one or more of the following:

### B. *The History of the Preemption Provisions of the Federal Legislation*

Of major importance to the drafters of the CPSA was the inclusion of a clear, effective preemption provision which would eliminate overlapping, inconsistent, and commercially debilitating systems of regulation.<sup>58</sup> Because federal statutes have often left the extent of federal preemption unfortunately vague,<sup>59</sup> the National Commission on Product Safety recommended,<sup>60</sup> and Congress in 1972 adopted, a far more detailed preemption provision for the CPSA than those typical of earlier federal legislation.<sup>61</sup> Under the original preemption provision enacted as section 26 in 1972, where a federal CPSC standard was in effect, a state regulation dealing with the same risk of

(1) . . . bring such product into conformity with the requirements of the applicable consumer product safety rule or . . . repair the defect in such product.

(2) . . . replace such product with a like or equivalent product which complies with the applicable consumer product safety rule or which does not contain the defect.

(3) . . . refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more . . .).

*Id.* § 2064(d).

58. Both the House and the Senate versions of the CPSA contained a preemption provision. See H. CONF. REP. NO. 1593, 92d Cong., 2d Sess. 60-61 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4596, 4651. The House provision was the one adopted in the final bill. *Id.*, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4651.

59. For cases analyzing preemption issues where federal legislation left these matters unresolved, see, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (federal airplane noise control act preempts local authority to impose curfew at local airport); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (federal standard of maturity in avocados does not preempt state authority to impose different standards).

60. See PROPOSED CONSUMER PROD. SAFETY ACT § 32, *reprinted in* NATIONAL COMM'N ON CONSUMER PROD. SAFETY, *supra* note 32, app., *reprinted in* 1972 House Hearings, *supra* note 32, at 529.

61. Consumer Product Safety Act, Pub. L. No. 92-573, § 26, 86 Stat. 1207 (1972) (current version at 15 U.S.C. § 2075 (1976)). In the CPSA as enacted in 1972, § 26 provided, in pertinent part, as follows:

(a) Whenever a consumer product safety standard under this chapter is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard.

(c) Upon application of a State or political subdivision thereof, the Commission may by rule, after notice and opportunity for oral presentation of views, exempt from the provisions of subsection (a) of this section (under such conditions as it may impose) a proposed safety standard or regulation described in such application, where the proposed standard or regulation (1) imposes a higher level of performance than the Federal standard, (2) is required by compelling local conditions, and (3) does not unduly burden interstate commerce.

*Id.* The House Committee Report on the 1972 bill stated that by this provision "[i]t is intended that Federal authority—once exercised—occupy the field and broadly preempt State authority to regulate the same product hazards." H.R. REP. NO. 1153, 92d Cong., 2d Sess. 49 (1972).

injury was presumptively preempted; however, the state regulation could be exempted from preemption if the state law "(1) impose[d] a higher level of performance than the federal standard, (2) [was] required by compelling local conditions, and (3) [did] not unduly burden interstate commerce."<sup>62</sup> The 1972 preemption provision generated neither state regulations nor court challenges, in part because of the states' willingness to await action from the CPSC during its formative years.<sup>63</sup>

When Congress began to consider amendments to the CPSA in 1975, industry support for the extensive preemption provisions was manifest. During the hearings on the proposed amendments, for example, at least one manufacturer requested that the Commission regulate bicycles under the CPSA, rather than the FHSA, in large part because the FHSA at that time had no counterpart to section 26 of the CPSA.<sup>64</sup> Similarly, representatives of the National Retail Merchants Association, the United States Chamber of Commerce, and several other business and industry groups, urged Congress to extend the application of the preemption provision of the CPSA to the FHSA and the FFA.<sup>65</sup> One witness explained that "the proliferation of divergent state and local safety regulations was one of the prime factors behind industry's general support of a federal consumer safety program."<sup>66</sup> The manufacturers thus favored a preemption provision that would protect industry from overlapping regulations. Consumer representatives, although not objecting to the preemption provision as a whole, argued that the "compelling local conditions" requirement for exemption under the 1972 provision was "unnecessary for the protection of industry from undue regulation and . . . subject to capricious interpretation."<sup>67</sup> Congress responded to the

62. Consumer Product Safety Act, Pub. L. No. 92-573, § 26(c), 86 Stat. 1207 (1972) (current version at 15 U.S.C. § 2075(c) (1976)). See note 61 *supra*.

63. See notes 12 & 20 and accompanying text *supra*.

64. *Proposed Amendments to Consumer Product Safety Act: Hearings on H.R. 5361 and H.R. 6107 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 34 (1975) (statement of Jay Townley).

65. The following industry groups testified on the preemption provisions: the Bicycle Manufacturers Association of America, *id.* at 44, 49-51, 55-57 (statement of Thomas F. Shannon); the Chamber of Commerce of the United States, *id.* at 149, 152, 154 (statement of Richard P. O'Brecht); the National Association of Manufacturers, *id.* at 104, 107-08, 113-14 (statement of Stanley Groner); the National Retail Merchants Association, *id.* at 141-49 (statement of Nancy L. Buc); Schwinn Bicycle Co., *id.* at 24-44 (statement of Jay Townley); the Toy Manufacturers of America, *id.* at 65-74 (statement of Aaron Locker); and Sears, Roebuck & Co., *id.* at 75-77, 79-81 (statement of Frank Case).

66. *Id.* at 143 (statement of Nancy L. Buc).

67. *Proposed Amendments to Consumer Product Safety Act: Hearings on S. 644 and S. 100 Before the Subcomm. for Consumer of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 32 (1975) (letter of Peter H. Schuck to Chairman Frank Moss). For the substance of § 26 as enacted in 1972, see notes 61 & 62 and accompanying text *supra*.

concerns of both manufacturers and consumers in the 1976 amendments, which dropped the provision requiring compelling local conditions for exemption of a state standard,<sup>68</sup> added the CPSA's strong preemption language to the FHSA, FFA, and PPPA,<sup>69</sup> and enumerated in some detail the factors to be considered by the Commission in determining whether to exempt a state regulation from federal preemption.<sup>70</sup>

68. See Consumer Product Safety Act, Pub. L. No. 92-573, § 26(c)(2), 86 Stat. 1207 (1972). For the complete text of the 1972 provision permitting exemption, *see* note 61 *supra*. The House Report explained the elimination of this requirement as follows: "So long as the existence of a differing State safety standard which provides a significantly higher level of protection does not impose an undue burden on interstate commerce, the lack of a compelling local condition should not preclude a State from affording its citizens such higher level of protection." H.R. REP. NO. 325, 94th Cong. 1st Sess. 23 (1975). For the text of § 26 as amended in 1976, *see* 15 U.S.C. § 2076 (1976); note 70 *infra*.

69. Consumer Product Safety Improvements Act, Pub. L. No. 94-284, § 17(a), 90 Stat. 503 (amending Federal Hazardous Substances Labeling Act, Pub. L. No. 86-613, § 17, 74 Stat. 372 (1960) (uncodified), *as amended by* Child Protection Act of 1966, Pub. L. No. 89-756, § 4(a), 80 Stat. 1303 (adding § 17(b)), *as further amended and renumbered by* Child Protection and Toy Safety Act of 1969, Pub. L. No. 91-113, § 4, 83 Stat. 187 (renumbering § 17 as § 18)); Pub. L. No. 94-284, § 17(b), 90 Stat. 503 (amending the Flammable Fabrics Act, Pub. L. No. 88-164, 67 Stat. 111 (1953), *as amended by* Act of Dec. 14, 1967, Pub. L. No. 90-189, § 10, 81 Stat. 568 (adding § 167)); Pub. L. No. 94-284, § 17(c), 90 Stat. 503 (amending the Poison Prevention Packaging Act of 1970, Pub. L. No. 91-601, § 8, 84 Stat. 1670).

70. 15 U.S.C. § 2076(c) (1976). Section 26 of the CPSA as amended in 1976 provides as follows:

(a) Whenever a consumer product safety standard under this chapter is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard.

(b) Subsection (a) of this section does not prevent the Federal Government or the government of any State or political subdivision of a State from establishing or continuing in effect a safety requirement applicable to a consumer product for its own use which requirement is designed to protect against a risk of injury associated with the product and which is not identical to the consumer product safety standard applicable to the product under this chapter if the Federal, State, or political subdivision requirement provides a higher degree of protection from such risk of injury than the standard applicable under this chapter.

(c) Upon application of a State or political subdivision of a State, the Commission may by rule, after notice and opportunity for oral presentation of views, exempt from the provisions of subsection (a) of this section (under such conditions as it may impose in the rule) any proposed safety standard or regulation which is described in such application and which is designed to protect against a risk of injury associated with a consumer product subject to a consumer product safety standard under this chapter if the State or political subdivision standard or regulation—

(1) provides a significantly higher degree of protection from such risk of injury than the consumer product safety standard under this chapter, and

(2) does not unduly burden interstate commerce.

In determining the burden, if any, of a State or political subdivision standard or regulation on interstate commerce, the Commission shall consider and make appropriate

The House Report accompanying its version of the bill explained that by the preemption provision it was generally intended "that Federal authority—once exercised—with respect to a risk of injury or illness broadly preempt State authority to regulate the same risks of injury except through requirements which are identical to the Federal requirements."<sup>71</sup> The Report justified the availability of exemptions from preemption, even where CPSC safety standards apply, as recognizing "the traditional role of the State in providing for the safety of its citizens."<sup>72</sup> The House Conference Report, which adopted the House version with only a "clarifying change,"<sup>73</sup> stated that it was intended that the

statutory findings made in determining if a requirement affects interstate commerce may not be reviewed [by a court] to determine if they are appropriate since the decision as to their appropriateness is to be made by the Commission in its discretion. . . .

. . . In determining whether the burden is undue, the Commission must weigh the extent of the burden against the benefit to public health and safety provided by the proposed State standard.<sup>74</sup>

The language of section 26,<sup>75</sup> together with its legislative history,<sup>76</sup> suggests that the focus of Congress' attention in adopting both the original and the amended preemption language was on cases where the CPSC itself chose to regulate a particular product risk. The preemption language in the statute refers by its terms solely to state regulations addressing product risks already dealt with by an existing federal standard under the CPSA.<sup>77</sup> It appears, therefore, that only

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(as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such standard or regulation, the cost of complying with such standard or regulation, the geographic distribution of the consumer product to which the standard or regulation would apply, the probability of other States or political subdivisions applying for an exemption under this subsection for a similar standard or regulation, and the need for a national, uniform standard under this chapter for such consumer product.

15 U.S.C. § 2076 (1976).

71. H.R. REP. NO. 325, 94th Cong., 1st Sess. 21 (1975).

72. *Id.*

73. H. CONF. REP. NO. 1022, 94th Cong., 2d Sess. 28 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 1017, 1030. The clarifying change was the insertion of the parenthetical phrase "(as determined by the Commission in its discretion)" into the last sentence of § 26(c). *Id.* For the text of § 26(c), see note 70 *supra*.

74. H. CONF. REP. NO. 1022, 94th Cong., 2d Sess. 28-29 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 1017, 1031.

75. See note 77 and accompanying text *infra*.

76. See text accompanying note 71 *supra*.

77. For the text of § 26, see note 70 *supra*. For example, § 26(c) speaks of exemptions for state regulations which affect a consumer product "subject to a consumer product safety stan-

in such cases would the extensive provisions dealing with exemptions from preemption become relevant to the question of state authority. The statute is totally silent regarding state regulation of product risks not yet subject to CPSC standards.

It now seems a bit ironic that Congress, in its unprecedented effort to delineate clearly the limits of state authority in the consumer product safety field, focused so exclusively on cases where a federal standard was already in place. The irony results from the inaction of the CPSC during its early years of existence. Contrary to the hopes of many who urged the creation of the Commission, the CPSC had issued only a handful of safety standards by the end of 1978.<sup>78</sup> Indeed, there are as yet no regulations implementing section 26 of the CPSA; interim regulations, however, have now been issued under the virtually identical preemption provisions of the Flammable Fabrics Act<sup>79</sup> and the Poison Prevention Packaging Act.<sup>80</sup> Meanwhile, the Commission's inactivity has subjected it to mounting criticism.<sup>81</sup>

As the CPSC begins to issue more safety standards, the product risks so regulated will become subject to the detailed provisions of section 26. However, because the Commission has enacted so few standards, the vast majority of federal-state conflicts regarding consumer product safety arising now will tend to be in areas where no

dard under this chapter." 15 U.S.C. § 2076(c) (1976) (emphasis added). The implication is clear that the federal standard is assumed to exist.

78. See CONSUMER PROD. SAFETY COMM'N ANN. REP. pt. 2, app. at 129-40 (1979) (Appendix L). See, e.g., 16 C.F.R. § 1201 (1979) (architectural glazing material); *id.* § 1202 (matchbooks); *id.* § 1205 (walk-behind lawn mowers); *id.* § 1207 (swimming pool slides); § 1501 (toys for children under 3 years of age); *id.* §§ 1508-1509 (baby cribs); *id.* §§ 1615-1616 (children's sleepwear); *id.* §§ 1630-1631 (carpets and rugs); *id.* § 1632 (mattresses). In addition, the Commission had issued bans on four types of products. See *id.* § 1301 (unstable refuse bins); *id.* § 1302 (flammable contact adhesives); *id.* § 1303 (lead paint); *id.* §§ 1304-1305 (certain items containing asbestos).

79. 16 C.F.R. §§ 1604.1-.10 (1979). The CPSC explained the promulgation of these regulations by stating that "the new preemption provision [of the FFA] has been in effect since May 11, 1976 and continued absence of procedural rules could lead to confusion and unnecessary expenditure of resources by everyone involved." 41 Fed. Reg. 31,569, 31,570 (1976).

80. 16 C.F.R. §§ 1704.1-.10 (1979). The CPSC gave the same reason for promulgating these regulations as it gave for promulgating the regulations under the preemption provision of the FFA. See note 79 *supra*. For further discussion of the interim regulations, see notes 94-114 and accompanying text *infra*.

81. See, e.g., 10 NAT'L J. 359 (1978). In 1976, the House Subcommittee on Oversight and Investigations reported to Congress that the CPSC "after 3 years has yet to demonstrate its capacity to plan, to prescribe administrative rules and guidelines, and to set clear priorities. Its issuance of a swimming pool slide standard as the first product safety standard, under The Consumer Product Safety Act is unjustified and inexcusable." 1976 OVERSIGHT REPORT, *supra* note 31, at 195.



federal standard is in effect, and thus, will be beyond the reach of section 26. In the absence of a federal standard, arguments that the states are powerless to regulate in the area of consumer safety must originate either from some preemptive implication of the federal legislation, or from the commerce clause itself. To understand fully the limits of state authority to regulate consumer product safety, we will therefore first explore the preemptive effect of section 26, and then discuss the arguments for implicit preemption and the limitations on state power imposed by the commerce clause.

### III. LIMITATIONS ON STATE POWER TO REGULATE CONSUMER PRODUCT SAFETY

#### A. *Where a Federal Standard Is In Effect*

Section 26 of the CPSA makes it clear that the CPSC can choose the extent to which it occupies any given area of consumer product safety regulation. Once the Commission issues a safety standard, state standards addressing the same product risk covered by the federal standard are prohibited in all but a few circumstances.<sup>82</sup> State stan-

82. 15 U.S.C. § 2075(c) (1976). For the text of this provision, see note 70 *supra*. Although state regulation in the form of a safety standard is subject to preemption by CPSC standards, state *bans* of products regulated by the CPSC are apparently not barred; the regulations promulgated by the CPSC under the FHSA explicitly so provide. 16 C.F.R. § 1500.7(d) (1979). The language of § 26, the CPSA preemption provision, speaks only of limits on state authority "to establish or to continue in effect any provision of a safety *standard* or regulation which prescribes any requirements as to . . . performance, composition, [etc.] . . ." 15 U.S.C. § 2075(a) (1976) (emphasis added). See note 70 *supra*. Moreover, that the preemptive effect of § 26 is not triggered by state *bans*, as distinguished from *standards*, has been noted by the CPSC itself. See Consumer Prod. Safety Comm'n Advisory Op. No. 266, CONS. PROD. L. (P-H) (1978).

In another opinion, the Commission gave a rather sweeping meaning to the phrase in § 26(a), "consumer product safety standard under this chapter." See Consumer Prod. Safety Comm'n Advisory Op. No. 269 (Sept. 12, 1978) (on file at the Villanova Law Review office). The Commission advised that state braking or reflectivity requirements for sidewalk bicycles are preempted by the general bicycle federal regulations if they are not identical even though the federal regulations specifically exempt sidewalk bicycles from their requirements. *Id.* at 3. The Commission's position is questionable. Since preemption under the federal legislation (here, the FHSA) is limited by § 26(a) to state regulations "designed to deal with the same risk of injury" addressed by a federal standard, preemption should arguably not apply where the CPSC has merely determined that protection from a risk was unnecessary, rather than issuing a regulation designed to protect from such risk. Further, the Commission's argument opens the door to suggestion that CPSC inactivity can be more generally treated as a series of "decisions not to act," potentially paralyzing the states from fulfilling their anticipated roles as consumer product safety regulators in areas not occupied by the CPSC. In a later opinion, the Commission seemed to narrow the potential sweep of this preemption-through-inaction theory by distinguishing preemption triggered by CPSC standards for architectural glazing materials from preemption under the safety standards for bicycles. Consumer Prod. Safety Comm'n Advisory Op. No. 275, at 2 (Jan. 30, 1979) (on file at the Villanova Law Review office). According to this later opinion, the Commission decided to "except" certain *products* from the requirements of its standards for architectural glazing materials, while in the case of sidewalk bicycles the Commis-

dards with requirements identical to those of CPSC standards are permitted to coexist.<sup>83</sup> State governments may continue to impose standards more protective than those of the CPSC on products for use by the state itself.<sup>84</sup> But where a state seeks to regulate a product risk already regulated by a CPSC standard, and the state requirements are not identical to that standard already in effect, the state's power is dependent upon the willingness of the CPSC to grant an exemption from the broad preemptive language of section 26.<sup>85</sup> For the Commission to exempt a state standard from preemption, section 26(c) requires not only that the standard provide "a significantly higher degree of protection" from the product risk than that provided by the existing standard, but also that the standard will "not unduly burden interstate commerce."<sup>86</sup> This provision concludes with an unusually detailed listing of factors to be considered in assessing the extent of the burden on interstate commerce.<sup>87</sup> The factors

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sion "decided not to impose safety requirements for one *aspect of* a regulated product." *Id.* (emphasis added). Thus, in the case of bicycle standards, the Commission based its opinion that there was preemption on its finding that "there is a safety standard in effect that addresses the risk or risks of injury presented by the product." *Id.* (emphasis added). This analysis, resting on whether the Commission has regulated the same *product*, seems inconsistent with the emphasis in § 26(a) on CPSC standards preempting state regulations addressing the "same risk of injury" addressed by the federal regulation—an emphasis recognized by the Commission itself in earlier opinions on preemption. See Consumer Prod. Safety Comm'n Advisory Op. No. 270 (Sept. 12, 1978) (on file at the Villanova Law Review office); Consumer Prod. Safety Comm'n Advisory Op. No. 270A (Jan. 16, 1979) (on file at the Villanova Law Review office). For a discussion of these opinions, see note 85 *infra*. See also notes 16-18 and accompanying text *supra*.

83. See 15 U.S.C. § 2075(a) (1976); note 70 *supra*.

84. See 15 U.S.C. § 2075(b) (1976); note 70 *supra*.

85. See 15 U.S.C. § 2075(c) (1976); note 70 *supra*. The CPSC's advisory opinions on bicycle regulation suggest some further limitations on the preemptive effect of CPSC standards. First, the Commission has interpreted § 26(a)'s preemption of state regulations designed to deal with "the same risk" addressed by a CPSC standard to be limited to state standards which address *only* the same risk as the CPSC standard. See Consumer Prod. Safety Comm'n Advisory Op. No. 270 (Sept. 12, 1978) (on file at the Villanova Law Review office); notes 16-18 and accompanying text *supra*. If a single state requirement is designed to alleviate two risks, only one of which is addressed by the federal standard, there is no preemption. Thus, since CPSC requirements for reflectivity of bicycles are designed only to alleviate risks associated with poor visibility of bicycles to car operators, they do not preempt state requirements for lights on bicycles ridden at night; lights increase not only the visibility of the bicycle to car operators, but also the visibility of the road to the cyclist. See Consumer Prod. Safety Comm'n Advisory Op. No. 270 (Sept. 12, 1978) (on file at the Villanova Law Review office); Consumer Prod. Safety Comm'n Advisory Op. No. 270A (Jan. 16, 1979) (on file at the Villanova Law Review office); notes 16-18 and accompanying text *supra*.

A second limitation on the preemptive effect of CPSC standards is suggested by the fact that the CPSC has recognized a distinction between regulations on the *use of equipment* on the one hand, and *new equipment* regulations on the other. Thus, standards prescribing equipment to be included on new items introduced into commerce (*e.g.*, bicycle reflectors) do not preempt requirements limiting the use of the items (*e.g.*, requirements that night-time cyclists use lights), so long as the use requirement does not "have the effect of setting any requirement which a bicycle must meet at the time it enters interstate commerce." Consumer Prod. Safety Comm'n Advisory Op. No. 270A (Jan. 16, 1979) (on file at the Villanova Law Review office).

86. 15 U.S.C. § 2075(c) (1976).

87. *Id.* For the text of § 26(c), see note 70 *supra*.

listed reflect two principal concerns: 1) the feasibility of compliance with the state standard;<sup>88</sup> and 2) the danger of multiple, overlapping regulation of a particular product group.<sup>89</sup>

The Senate Report on its version of the preemption clause (which is very similar to the final version) underscored the balancing of interests in the preemption scheme.<sup>90</sup> The clause was designed, the Report stated, "to meet the competing interests of those who view Federal requirements as merely minimum standards and those who would opt for uniform national requirements."<sup>91</sup>

While the CPSC has not yet issued regulations or decisions to grant or reject exemption requests under the CPSA, the Commission has issued regulations under the amended preemption provisions of two of the other statutes for which it has administrative responsibility.<sup>92</sup> As discussed above, the Flammable Fabrics Act, the Poison Prevention Packaging Act, and the Federal Hazardous Substances Act were amended by the same bill that amended the CPSA to give all four statutes identical preemption provisions.<sup>93</sup> The regulations promulgated under the preemption provisions of both the PPPA and

88. Section 26(c) lists three factors for CPSC consideration which reflect this concern: 1) "the technological and economic feasibility of complying with such standard or regulation"; 2) "the cost of complying with such standard or regulation"; and 3) "the geographic distribution of the consumer product to which the standard or regulation would apply." 15 U.S.C. § 2075(c) (1976).

89. Section 26(c) lists two factors for CPSC consideration which reflect this concern: 1) "the probability of other States or political subdivisions applying for an exemption under this subsection for a similar standard or regulation"; and 2) "the need for a national, uniform standard under this chapter for such consumer product." *Id.*

90. See S. REP. NO. 251, 94th Cong., 1st Sess. 12-13 (1975); reprinted in [1976] U.S. CODE CONG. & AD. NEWS 993, 1004-05.

91. *Id.* at 12, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 1004.

The language of the Senate version of § 26(c)(2) differed from the House version; the Senate version would have required that in order to be exempted from preemption a state standard must not place "undue burden upon the manufacture or distribution of products in interstate commerce." *Id.* at 12-13, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 1004-05 (emphasis added). The Senate Report stated as follows:

[I]t is the Committee's intention to establish a standard different from the general constitutional test of the commerce clause. The "burden" referred to in these amendments is that which falls upon the manufacturing process or the distribution system for goods moving in interstate commerce. Thus, it is intended, for example, to be distinguished from those cases in which the courts have held that cost is not a factor in determining whether there is a burden on commerce.

*Id.* at 13, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 1005. Although the House version, with its more general requirement that the state standard not "unduly burden interstate commerce," was adopted on the point, § 26(c) still requires that the CPSC consider the cost to the manufacturer in assessing the burden on interstate commerce posed by permitting exemption. 15 U.S.C. § 2075(c) (1976); see note 70 *supra*.

92. See Applications for Exemption from Preemption, 16 C.F.R. §§ 1604.1-.10 (1979) (promulgated under the FFA); Applications for Exemption from Preemption, *id.* §§ 1704.1-.10 (promulgated under the PPPA); notes 79-80 and accompanying text *supra*.

93. See notes 34-40 and accompanying text *supra*.

the FFA are identical in all material respects. One may assume, therefore, that the regulations regarding state applications for exemption under the preemption clause of the CPSA and the FHSA will be substantially similar to those issued under the FFA and the PPPA.

The regulations under the FFA and the PPPA on applications for exemption from preemption assign to the states the responsibility for determining that an exemption from preemption is necessary.<sup>94</sup> The regulations also establish prerequisites for a state petition for Commission consideration of the application: 1) the state standard must have been "enacted or issued in final form by the authorized body";<sup>95</sup> and 2) the petition must show that the state standard would be preempted by the federal law.<sup>96</sup> Elaborating on the statute, the FFA regulation explains the limits of preemption as follows:

If there is no Federal . . . standard or regulation in effect that is applicable to the item covered by the State or local government requirement, or if the State or local government requirement is designed to protect against a different risk (of injury) . . . than that addressed by the Federal standard or regulation, the State or local government provision would not be preempted . . . .<sup>97</sup>

The regulations require that the application contain certain information "necessary for the Commission to consider its statutory findings."<sup>98</sup> For example, the application must provide information

94. 16 C.F.R. §§ 1604.3(c), 1704.3(c) (1979).

95. *Id.* §§ 1604.4(a), 1704.4(a). The regulation further states that a standard "is considered 'enacted' or 'issued' if the only bar to the establishment or continued effectiveness of the standard or other regulation is preemption" by the FFA or PPPA. *Id.* §§ 1604.4(a)(1), 1704.4(a)(1).

The regulation also provides that if a state or local government is considering passage of a standard, the state or local government may request an advisory opinion from the Commission's general counsel. *Id.* §§ 1604.4(a)(2), 1704.4(a)(2). The opinion will advise "whether the consumer product sought to be regulated is the subject of a Commission standard or other regulation and, if so, the coverage of such standard or other regulation." *Id.* The regulation does not require or even expressly permit the Commission to determine in advance whether the state or local regulation would be preempted if issued or enacted.

96. *Id.* §§ 1604.4(b), 1704.4(b).

97. *Id.* § 1604.4(b). The language of the regulation under the PPPA is identical in all material respects. *See id.* § 1704.4(b).

98. 41 Fed. Reg. 37,124, 37,125 (1976) (notice accompanying FFA preemption regulations); 41 Fed. Reg. 31,569, 31,570 (1976) (notice accompanying PPPA preemption regulations). In words identical in all material respects to the FFA notice, the PPPA notice explained the workings of the regulation as follows:

Unless the State or local government submits the fullest possible information, the Commission may not be able to make the statutory findings required to grant the application for an exemption. [The regulation] is not intended to preclude any other information which the applicant deems necessary to state its case. The Commission may also request any additional information needed to reach a decision on an application and may seek additional information itself. In making a decision on an application, the Commission may consider information in addition to the information in the application and any oral or written comments on the application.

*Id.*

"indicating whether the State or local government [standard] provides a significantly higher degree of protection" from the risk involved.<sup>99</sup> If possible, this information must include the following: 1) a description of the hazard or risk of injury addressed by the state standard;<sup>100</sup> 2) an explanation of the state standard and its rationale;<sup>101</sup> 3) a comparison of the state and federal standards to show the differences;<sup>102</sup> 4) an explanation of any tests required by the state standard;<sup>103</sup> 5) a comparison of results from any test required by the state standard and results from any federal test similarly required;<sup>104</sup> and 6) data to show the reduction of hazard or risk of injury resulting from the state standard.<sup>105</sup>

The state is also required to provide "[i]nformation, data, or material indicating the effect on interstate commerce of granting the requested exemption."<sup>106</sup> Based on this information, according to the regulation, the Commission will make its finding whether the exemption of the state regulation would unduly burden interstate commerce.<sup>107</sup> "In determining whether the burden is undue, the Commission must weigh the extent of the burden against the benefit to public health and safety that would be provided by the State or local government [standard]."<sup>108</sup>

To facilitate this weighing, states must submit information on the following: the technological and economic feasibility of compliance with the proposed state standard;<sup>109</sup> the cost of compliance;<sup>110</sup> the geographic distribution of the products to which the state standard would apply;<sup>111</sup> the probability that other states will apply for an exemption for a similar standard or requirement;<sup>112</sup> and any cir-

99. 16 C.F.R. §§ 1604.7(c), 1704.7(e) (1979). Information required by other provisions includes the following: 1) a copy of the state or local standard with, if possible, its legislative history, *id.* §§ 1604.7(a), 1704.7(a); 2) "an explanation of why compliance with the State or local government standard would cause . . . [the product] to be in violation" of the federal standard, *id.* §§ 1604.7(b), 1704.7(d); and 3) "a list of interested parties including consumer groups potentially affected," *id.* §§ 1604.7(e), 1704.7(g).

100. *Id.* §§ 1604.7(c)(1), 1704.7(e)(1).

101. *Id.* §§ 1604.7(c)(2), 1704.7(e)(2).

102. *Id.* §§ 1604.7(c)(3), 1704.7(e)(4).

103. *Id.* §§ 1604.7(c)(4), 1704.7(e)(3).

104. *Id.* §§ 1604.7(c)(5), 1704.7(e)(4).

105. *Id.* §§ 1604.7(c)(6), 1704.7(e)(6).

106. *Id.* §§ 1604.7(d), 1704.7(f).

107. *Id.*

108. *Id.*

109. *Id.* §§ 1604.7(d)(1), 1704.7(f)(1).

110. *Id.* §§ 1604.7(d)(2), (3), 1704.7(f)(2), (3).

111. *Id.* §§ 1604.7(d)(4), 1704.7(f)(4).

112. *Id.* §§ 1604.7(d)(5), 1704.7(f)(5).

cumstances weighing against the need for a national, uniform standard.<sup>113</sup>

The regulations regarding exemptions from preemption closely follow the statutory language and the legislative history of these provisions.<sup>114</sup> States requesting an exemption must present extensive information in substantial technical detail.<sup>115</sup> It is clearly not a task to be undertaken lightly.

The first and, as yet, the only request for an exemption came from the State of California.<sup>116</sup> The state sought an exemption from the federal flammability standards for children's clothing promulgated under the FFA (covering only sleepwear), to permit the state to enforce its regulations requiring the labeling of flammable fabrics and the extension of the federal flammability standards to cover *all* children's clothing.<sup>117</sup> The case is useful to consider here both because the findings of fact and reasons for denial illuminate the Commission's approach to "balancing" burdens and benefits, and because the decision to deny California's request suggests the strength of the presumption in favor of preemption and *against* exemption built into the legislation.

After receiving the California request, the Commission proposed a regulation permitting the exemption,<sup>118</sup> took testimony in oral and written form,<sup>119</sup> and then denied the California exemption request.<sup>120</sup> The Commission rested this denial on the basis that "the California regulations would unduly burden interstate commerce."<sup>121</sup> The question whether the California standard would have provided a higher degree of protection<sup>122</sup> was not addressed by the Commission

113. *Id.* §§ 1604.7(d)(6), 1704.7(f)(6).

114. For a discussion of the preemption provisions and their legislative history, see notes 58-74 and accompanying text *supra*.

115. See notes 98-113 and accompanying text *supra*.

116. Proposed Exemption from Preemption, 41 Fed. Reg. 56,294, 56,294 (1976). The Commission found that the request filed by the state complied with the regulations establishing the requirements for proposal of the exemption. *Id.* For the requirements for proposal of an exemption, see notes 95-113 and accompanying text *supra*.

117. 41 Fed. Reg. at 56,294-95. The federal standards for children's clothing are codified in 16 C.F.R. §§ 1610, 1615-1616 (1979).

118. 41 Fed. Reg. at 56,295.

119. 42 Fed. Reg. 39,402, 39,403 (1976). The Commission took oral testimony at hearings held in Washington, D.C., San Francisco, and Los Angeles. *Id.*

120. *Id.* at 39,408.

121. *Id.* For a discussion of the factors which led the Commission to so conclude, see notes 124-29 & 132-33 and accompanying text *infra*.

122. See text accompanying note 86 *supra*.

in its findings; the finding of an "undue burden" made this determination "unnecessary."<sup>123</sup>

The Commission's detailed findings of fact on all aspects of the burdensome impact on interstate commerce indicated the following effects: 1) the proposed standard would be inconvenient and costly to manufacturers and distributors of children's clothing;<sup>124</sup> 2) the standard was in part technologically infeasible;<sup>125</sup> 3) the standard would substantially increase costs to the consumer;<sup>126</sup> and 4) the standard would disrupt existing geographic distribution patterns for fabrics manufactured into children's clothing.<sup>127</sup> The Commission also received information indicating that a number of other states would adopt similar flammability standards for children's clothing and would apply for exemptions if the California application were granted.<sup>128</sup> This highly detailed information, discussed at length by the Commission, described only the burden side of the balance.<sup>129</sup>

On the benefit side, the Commission received information regarding "burn scenarios," incidence and prevalence of burns to chil-

123. 42 Fed. Reg. 39,402, 39,408 (1976). In its notice proposing the regulation exempting the California standards, the Commission had also sought information and data on these questions. 41 Fed. Reg. 56,296 (1975).

124. 42 Fed. Reg. 39,402, 39,404, 39,406-07 (1976). The Commission analyzed the California labeling and flammability requirements separately. *Id.* at 39,404. The Commission received lengthy statistical and economic testimony of the increased cost in the manufacture of children's clothing to be caused by the California labeling and flammability standards, and found that it indicated a burden on interstate commerce. *Id.* at 39,404, 39,406-07.

125. *Id.* at 39,405-06. The Commission received no testimony indicating that it was not technologically feasible to comply with the labeling requirements, and therefore could not find that any burden on interstate commerce existed due to a lack of adequate technology. *Id.* at 39,404. The Commission did receive lengthy testimony on the technological difficulties posed by requiring compliance with the California manufacturing-related regulations. *Id.* at 39,405-06. The information elaborated on the state of the art in treating fabrics and threads with flame retardants. *Id.*

126. *Id.* at 39,404, 39,406. The information received regarding the cost to the consumer caused by exemption of the California standards included, for example, studies showing an increase in retail cost of 25% in a \$4.00 garment if the labeling requirement were imposed, *id.* at 39,404, and cost increases of between 25 and 65 percent if the flammability standards were imposed. *Id.* at 39,406.

127. *Id.* at 39,404, 39,407.

128. *Id.* at 39,407. Nine states were mentioned in this regard: Arkansas, Colorado, New Hampshire, New York, Massachusetts, Michigan, Texas, Washington, and Wisconsin. *Id.* Since the Commission received no comments indicating that any other state would also apply for an exemption from labeling requirements, it was unable to find that the possibility of other states applying created a burden on interstate commerce. *Id.* at 39,404.

129. *Id.* at 39,404, 39,407. The Commission also received comments indicating that there was a need for a national, uniform flammability standard, and that there were no special circumstances making it necessary for California to have its own flammability regulations. *Id.* at 39,407. Thus, the Commission concluded that the California flammability standards would impose a burden on interstate commerce. *Id.* Since no comments were received regarding the need or lack of need for a national uniform labeling standard, the Commission was "unable to make a factual determination . . . concerning the need for a national, uniform . . . standard requiring . . . labeling." *Id.* at 39,404.

dren, and the severity of the injuries resulting from such burns.<sup>130</sup> The Commission's ruling, however, does not evaluate this information. Judging by the scant amount of space in the opinion devoted to information received on the benefit side, it may be that there simply was not enough information on benefits presented to the Commission.<sup>131</sup>

Among the particular facts that led to the determination that the California exemption's burden on interstate commerce was undue were the following: 1) some fabrics would no longer be sold in California because they would be unable to comply with the standard; 2) the State Fire Marshall himself conceded that the "vast majority" of consumers "would not consider the few available flame retardant fabrics to be satisfactory for most articles of children's clothing"; 3) technological impediments to compliance existed; and 4) compliance would impose a high cost to consumers (an additional annual cost to California consumers of \$150-250 million).<sup>132</sup> Noting that even the testimony of the State Fire Marshall conceded facts indicating a great burden on interstate commerce, the Commission concluded that neither the State of California nor any other party had "shown that the burden of the California regulations on interstate commerce [was] outweighed by any benefit to public health and safety that may be provided by the California regulations."<sup>133</sup>

The denial of the California request illustrates that where a federal safety standard is in effect, so that the explicit preemption provision of either section 26 or one of its counterparts is called into play, the state bears a heavy burden to overcome the statute's preemptive force. Would the California regulation have withstood a court challenge if there had been no federal regulation of flammability in children's clothing? Or is there a possibility that a state regulation of consumer product safety could be implicitly preempted? The next section addresses the notion of implicit preemption to determine what limits it may place on state regulation.

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130. *Id.* at 39,407-08.

131. The portion of the Commission's opinion describing the burden of the exemption consumed over ten times the column space devoted to its discussion of the benefits. *See id.* at 39,404-08.

132. *Id.* at 39,408.

133. *Id.*



B. *Where No Federal Standard Is In Effect*1. *Implicit Preemption*

If federal legislation is to be “the supreme Law of the Land” as the supremacy clause requires,<sup>134</sup> then where federal legislation prohibits or limits state regulation, inconsistent state activity must yield to the congressional mandate.<sup>135</sup> As the immediately preceding discussion of section 26 of the CPSA suggests,<sup>136</sup> where Congress explicitly preempts state activity, analysis of the preemptive effect of federal legislation should require only traditional statutory interpretation of the “plain meaning” of the statutory language in light of the policies behind the congressional action.

But preemption of state law need not be explicit. To be sure, as Mr. Justice Douglas stated thirty-one years ago in *Rice v. Sante Fe Elevator Corp.*,<sup>137</sup> the “historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.”<sup>138</sup> However, such a “clear and manifest purpose” to preempt may not appear in the statutory language. When the legislation by itself fails to resolve all questions of preemption, then the answers must be inferred from the congressional purpose behind the statute.<sup>139</sup> The court will draw the inferences from several sources, as the *Rice* opinion explains:

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch on a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute.<sup>140</sup>

The *Rice* decision is a good illustration of the Court’s approach to preemption. In *Rice*, the Supreme Court faced a question of the preemptive effect of amendments to the United States Warehouse

134. For the text of the supremacy clause, see note 3 *supra*.

135. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405-06 (1819). For a discussion of *Gibbons*, see note 5 *supra*.

136. See text accompanying notes 82-91 *supra*.

137. 331 U.S. 218 (1947).

138. *Id.* at 230 (citations omitted).

139. *Id.*

140. *Id.* (citations omitted).

Act (Act).<sup>141</sup> Although the Act, as originally enacted, made federal regulation in the area subservient to state law,<sup>142</sup> the statute was changed in 1931 to provide that "the power, jurisdiction and authority conferred . . . under this Act shall be exclusive."<sup>143</sup> When proceedings were commenced against Illinois warehousemen under Illinois statutes in 1944, they sought injunctive relief on the ground that the 1931 amendments to the Federal Act preempted the state regulation.<sup>144</sup> *Rice* thus presented a controversy where Congress had explicitly addressed the preemption issue in its legislation. Nonetheless, the Court did not find that the statutory language, standing alone, resolved the preemption issue. Instead, the Court presented a lengthy analysis of the legislative history of the amendments to the Federal Act emphasizing, for example, a statement in a House Report that the exclusivity provision was designed to make the Act "independent of any State legislation on the subject."<sup>145</sup> Based on such history, the Court announced that the test for determining whether state warehouse regulation has been preempted by the Act is "whether the matter on which the State asserts the right to act is [in] any way regulated by the Federal Act."<sup>146</sup> Applying this test to the twelve alleged violations of state law at issue, the Court held that the Illinois statutes governing nine of the charges had been preempted,<sup>147</sup> but found no preemption of the state law applicable to the remaining three allegations.<sup>148</sup>

In addition to enunciating the test for preemption by inference quoted above,<sup>149</sup> *Rice* teaches that even where a federal statute contains language addressing the preemption issue, the limits of the stat-

141. *Id.* at 222. See United States Warehouse Act, 7 U.S.C. §§ 241-273 (1976). The Act provides, *inter alia*, for the licensing, inspecting, and maintenance of warehouses, and prohibits discrimination in choosing customers. See, e.g., *id.* §§ 243, 244, 254 & 260.

142. See United States Warehouse Act, ch. 313, pt. C, § 29, 39 Stat. 490 (1916) (current version at 7 U.S.C. § 269 (1976)). The Act at that time provided, in pertinent part, that "nothing in this Act shall be construed to conflict with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses . . . ." *Id.* The quoted portion of the Act was eliminated by the amendment at issue in *Rice*. See Act of Mar. 2, 1931, ch. 366, § 9, 46 Stat. 1463 (codified at 7 U.S.C. § 269 (1976)).

143. Act of Mar. 2, 1931, ch. 366, § 9, 46 Stat. 1463 (codified at 7 U.S.C. § 269 (1976)).

144. 331 U.S. at 220-22.

145. *Id.* at 234, quoting H.R. REP. NO. 2314, 70th Cong., 2d Sess. 4 (1931). See also 331 U.S. at 223-24, 223 n.4, 233-34 (quoting other pertinent portions of the legislative history of the United States Warehouse Act).

146. 331 U.S. at 236.

147. *Id.*

148. *Id.* at 237. The Court stated that because the Act "contains no language relating expressly to these three matters," state law should not be preempted. *Id.* The Court acknowledged that future conflicts might arise in the areas left to state regulation by the decision, but declared that "[a]ny such objections are at this stage premature." *Id.*

149. See note 140 and accompanying text *supra*.

ute's preemptive effect may be determined by examining the whole statute together with its legislative history.<sup>150</sup> In other words, arguments for both explicit and implicit preemption may be applicable. The emphasis in *Rice* on eliciting and achieving the purposes of the federal legislation reaffirms the notion that, within the realm of its constitutional authority, Congress is free to control the extent of federal preemption of state legislation.<sup>151</sup> And yet, even though preemption issues are frequently phrased by the Supreme Court as questions of congressional intent,<sup>152</sup> those questions may turn on factors lying outside the specific concerns actually in the minds of the Congresspersons who voted to enact particular legislation.<sup>153</sup> Thus, the critical issue to be resolved is not restricted to whether Congress consciously intended preemption; rather, it must also be determined whether the overall objectives of Congress in enacting the legislation would be thwarted by the challenged state action.<sup>154</sup>

This principle, that issues of implicit preemption are to be resolved by examining the probable effect of the challenged state law on Congress' legislative objectives, is also well illustrated by the Court's more recent decision in *Jones v. Rath Packing Co.*<sup>155</sup> In *Rath Packing*, the Court invalidated California labeling requirements for bacon and flour on the ground that they were preempted by two federal

150. See notes 144-48 and accompanying text *supra*.

151. 331 U.S. at 229-30. "It is clear that since warehouses engaged in the storage of grain for interstate or foreign commerce are in the federal domain, . . . Congress may, if it chooses, take unto itself all regulatory authority over them . . . , share the task with the States, or adopt as federal policy the state scheme of regulation." *Id.* (citations omitted).

152. See, e.g., *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443-46 (1960); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 10 (1957); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956); *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79, 84 (1939). Consider the general statement of principles applicable to preemption issues set forth in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), where the Court stated that "[t]he test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Id.*

153. See generally Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209-10 (1959). The Stanford author stated as follows:

By framing the pre-emption question in terms of specific congressional intent the Supreme Court has manufactured difficulties for itself. Apart from the difficult problem of defining which Congress' and which congressman's intent is relevant, this manner of stating the issue suggests that the pre-emption question was consciously resolved and that only diligent effort is needed to reveal the intended solution. But Congress, embroiled in controversy over policy issues, rarely anticipates the possible ramifications of its acts upon state law.

*Id.* at 209 (footnotes omitted).

154. The classic formulation of this issue is whether the state action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

155. 430 U.S. 519 (1977).

statutes.<sup>156</sup> In both situations, the applicable federal regulations allowed greater variation between the actual weight of products offered for sale and the weight stated on the package label than the California regulations permitted.<sup>157</sup> With respect to bacon labeling, the stricter California standard was held to be explicitly preempted by language in the Federal Meat Inspection Act<sup>158</sup> which prohibits “[m]arking, labeling, packaging, or ingredient requirements in addition to or different than, those made” pursuant to the federal statute.<sup>159</sup> The state labeling requirements applicable to flour packages presented a more difficult problem, however, since the applicable federal statute, the Fair Packaging and Labeling Act (FPLA),<sup>160</sup> contained preemptive language not nearly so strong as that in the Federal Meat Inspection Act.<sup>161</sup>

Concluding that the FPLA did not explicitly preempt the California statute,<sup>162</sup> the Court examined the effect of the California statute to determine whether it had been implicitly preempted.<sup>163</sup> While the California standard required that the label accurately reflect the weight of the product at the time of *sale*, the federal standard merely required that the label accurately reflect the weight at the time of *packing* and allowed for subsequent changes in weight due to moisture loss.<sup>164</sup> Thus, the Court reasoned, non-California flour packers would have to overpack to ensure conformity with the California standards, while California packers—able to adjust for local climate conditions—and non-California producers not marketing in California would be able to pack less flour in a package of nominally the same weight.<sup>165</sup> The Court concluded that this result would frustrate a central policy of the federal statute: “to facilitate value com-

156. *Id.* at 530-32, 540-43. The California statute prescribing the challenged labeling requirements, CAL. BUS. & PROF. CODE § 12211 (West 1964 & Supp. 1979), was held by the Court to be explicitly preempted regarding bacon packages by the Federal Meat Inspection Act, 21 U.S.C. § 678 (1976), and implicitly preempted regarding flour packages by the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-1461 (1976). 430 U.S. at 530-32, 540-43.

157. 430 U.S. at 531-32, 541-42. For a discussion of the differences between the federal and state standards, see text accompanying note 164 *infra*.

158. 21 U.S.C. §§ 601-695 (1976).

159. 430 U.S. at 530, quoting 21 U.S.C. § 678 (1976).

160. 15 U.S.C. §§ 1451-1461 (1976).

161. The preemption provision of the Fair Packaging and Labeling Act superseded state requirements only “insofar as they . . . provide for the labeling of the net quantity of contents of the package . . . which [is] less stringent than or require[s] information different from” federal standards. 15 U.S.C. § 1461 (1976).

162. 430 U.S. at 538-40.

163. *Id.* at 540-41.

164. *Id.* at 531-32, 541-42.

165. *Id.* at 541-43.

parisons among similar products.”<sup>166</sup> Therefore, the Court held that the California labeling regulations were implicitly preempted.<sup>167</sup>

Since federal legislation can implicitly preempt state activity which frustrates the objectives of the federal law,<sup>168</sup> and can do so even where express statutory language addresses the question of preemption,<sup>169</sup> we must reexamine the legislative scheme and objectives of the Consumer Product Safety Act to determine whether its preemptive effect extends beyond the limited situations specifically addressed by section 26 (*i.e.*, where there is no federal safety standard in effect).<sup>170</sup>

It is likely that any argument that state regulation of consumer product safety is implicitly preempted by the CPSA would stress the concern, reflected in the statute's legislative history, that manufacturers should only be subjected to a single, uniform pattern of regulation administered by the federal government.<sup>171</sup> Indeed, one reason for enactment of the CPSA in the first place was the criticism of the jurisdictional confusion and casual administration of state regulatory efforts contained in the report of the National Commission on Product Safety.<sup>172</sup> Proponents of this argument might characterize creation of the CPSC as a congressional decision to federalize and centralize product safety regulation, or to “occupy the field” that had been poorly handled by the states.

To bolster such an argument, it would be tempting to draw on the apparent parallels between a controversy in this field and the conflict resolved by the Supreme Court in *Guss v. Utah Labor Relations Board*.<sup>173</sup> *Guss* determined that the National Labor Relations

166. *Id.* at 541, 543.

167. *Id.* The Supreme Court has, on occasion, recognized that preemption need not be limited to cases where there is a clear “conflict” between federal law and state law in the sense that the federal and state statutes would require the same individuals or entities to act in contrary ways. *See, e.g.*, *Campbell v. Hussey*, 368 U.S. 297, 300-01 (1961); *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954); *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945). Indeed, one commentator has suggested that the Supreme Court's preemption decisions can be classified as “conflict” cases, “interference” cases, and cases where federal law has “occupied the field.” Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 526-33.

168. *See* notes 137-67 and accompanying text *supra*.

169. *See* *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); notes 156-67 and accompanying text *supra*.

170. *See* notes 82-91 and accompanying text *supra*; text accompanying note 77 *supra*.

171. For examples of the arguments advanced by industry representatives during congressional consideration of the 1976 amendments to § 26 of the CPSA, *see* notes 64-67 and accompanying text *supra*.

172. *See* note 33 and accompanying text *supra*.

173. 353 U.S. 1 (1957). In *Guss*, a union had been certified by the National Labor Relations Board (NLRB) as the bargaining representative of a small manufacturer's employees at a time when the NLRB chose to exercise jurisdiction over businesses of such small size. *Id.* at 3-5.

Act (NLRA)<sup>174</sup> preempted state regulation of labor relations in areas where the National Labor Relations Board (NLRB) had declined to exercise its authority for internal administrative reasons.<sup>175</sup> Section 10(a) of the NLRA<sup>176</sup> allows the NLRB to cede agency jurisdiction over unfair labor practices to state agencies under certain circumstances.<sup>177</sup> From the presence of this clause, and the absence of any other legislative provision for state activity, the Court discerned a congressional intention to limit state activity in the field to areas where jurisdiction was ceded pursuant to section 10(a).<sup>178</sup>

The analogy between the *Guss* case and the issue of preemption under the CPSA is based on the presence in both situations of the following factors: 1) an articulated congressional concern for uniform regulation in the field;<sup>179</sup> 2) the presence of an accommodation provision in the applicable federal statute allowing limited state activity, with permission of the federal agency;<sup>180</sup> and 3) the disinclination of the federal agency, for reasons administrative rather than substantive, to become involved in an area within its statutory authority.<sup>181</sup>

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After the union had filed charges with the NLRB that the manufacturer had engaged in unfair labor practices, the NLRB revised its guidelines for exercising jurisdiction to exclude manufacturers of the size of the manufacturer in *Guss*. *Id.* at 3-4. The NLRB, therefore, declined to exercise jurisdiction, and the union filed substantially the same charges with the state labor relations board pursuant to the state labor relations act. *Id.* at 5. The manufacturer appealed from the state supreme court's affirmance of the state board's remedial order finding that the state board had jurisdiction over the dispute. *Id.* at 5-6.

174. 29 U.S.C. §§ 151-188 (1976).

175. 353 U.S. at 9-10.

176. 29 U.S.C. § 160(a) (1976).

177. *Id.* See 353 U.S. at 6-9. Section 10(a) provides:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160(a) (1976).

178. 353 U.S. 7-10. The Court stated that § 10(a) was "the exclusive means whereby states may be enabled to act concerning the matters which Congress has entrusted to the [NLRB]." *Id.* at 9.

179. For a discussion of Congress' concern for uniformity in labor regulation, see *id.* at 9-11. For a discussion of the concern for uniformity in the enactment of the CPSA, see notes 58 & 64-67 and accompanying text *supra*.

180. Compare the text of § 10(a) of the NLRA, note 177 *supra*, with the text of § 26 of the CPSA, note 70 *supra*.

181. For a discussion of the NLRB's decision not to exercise its jurisdiction over small scale businesses, see 353 U.S. at 3-4; note 173 *supra*. For a discussion of the CPSC's inactivity in the consumer product safety area during its early years of existence, see notes 8, 20 & 78-81 and accompanying text *supra*.

Upon closer analysis, however, the analogy between the provision of the NLRA interpreted in *Guss* and section 26 of the CPSA is weak. *Guss* can be fully understood only in light of the Supreme Court's view of labor relations as a field specially given over by Congress to centralized federal control.<sup>182</sup> The Court has repeatedly recognized the special need for a single regulatory authority in labor relations to allow for "delicately structuring the balance of power among competing forces."<sup>183</sup> Nor is labor relations the only area where Congress has been interpreted as having occupied an entire field, for the Court has also held that Congress occupied the field in the registration and regulation of aliens.<sup>184</sup> Here again, however, a strong federal policy, arguably more compelling than the protection of businesses from overlapping regulation, supported the Court's decision: the prevention of friction between the United States and foreign governments which might be caused by state and local governments imposing discriminatory burdens on aliens.<sup>185</sup>

The need for exclusive federal regulation is inherently less compelling in consumer product safety than in other fields held subject to but one federal master. Unlike the regulation of aliens, with its strong ties to foreign affairs generally,<sup>186</sup> consumer product safety has no roots in historically or constitutionally defined federal interests. Rather, consumer product safety regulation by states will be directed at protecting the public health and safety, an interest squarely within

182. See note 183 *infra*.

183. *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. v. Lockridge*, 403 U.S. 274, 286 (1971). See also *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260-61 (1964); *San Diego Bldg. Trades Council v. Garman*, 359 U.S. 236, 242-43 (1959); *Garner v. Teamsters Local 776*, 346 U.S. 485, 490-91 (1953). Commentators have generally cited the labor relations field as one where federal policy requires a single national policy with the federal government as the "one master" because of such overriding federal interest. See, e.g., J. BARRON & C. DIENES, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 288 (1975); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 387 (1978); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1337-39 (1972).

184. See *Hines v. Davidowitz*, 312 U.S. 52, 72-74 (1941). *Hines* involved a challenge to the Pennsylvania Alien Registration Act, PA. STAT. ANN. tit. 35, §§ 1801-1806 (Purdon 1977), which required aliens residing within Pennsylvania to register annually with the state, *id.* § 1801, and which provided for fines of up to \$100 or imprisonment for up to 60 days or both for violating the act. *Id.* § 1805. See also 312 U.S. at 59-60. After the Pennsylvania Act was passed, Congress enacted the Alien Registration Act of 1940, ch. 439, §§ 1-41, 54 Stat. 670 (current version at 8 U.S.C. §§ 1301-1306 (1976)). See 312 U.S. at 60-61. The Court interpreted the Federal Act to provide "a standard for alien registration in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens," while protecting "the personal liberties of law-abiding aliens through one uniform national registration system." *Id.* at 74. The Court therefore held that the Pennsylvania Act was unenforceable under the supremacy clause. *Id.*

185. 312 U.S. at 64-68.

186. See *Hines v. Davidowitz*, 312 U.S. 52, 72-74 (1941). For a discussion of *Hines*, see note 184 *supra*.

the traditional exercise of the state police power.<sup>187</sup> Thus, the argument that the enactment of the CPSA implicitly preempts all state regulation of consumer product safety is not persuasive.

The argument for implicit preemption by the CPSA is further weakened when the language of section 26 is read with its legislative history.<sup>188</sup> Unlike the section of the NLRA at issue in the *Guss* case,<sup>189</sup> section 26 is not structured as a provision for pervasive preemption qualified by a provision permitting exemption by the federal agency. Instead, the preemptive language of the CPSA is limited by its terms only to product risks already subject to a CPSC standard.<sup>190</sup> This limitation has been explicitly recognized by the CPSC itself in its interim regulations under the identically worded preemptive provisions of the Flammable Fabrics Act and the Poison Prevention Packaging Act.<sup>191</sup> Thus, the most reasonable interpretation of Congress' objective in enacting the CPSA preemption provision is simply that manufacturers should not be subjected to both federal and state regulations of the same product risks, and not that Congress sought to place all regulation of consumer product safety under the jurisdiction of the CPSC.

## 2. Limitations Imposed by the Commerce Clause of the United States Constitution

The state power to regulate consumer product safety in a manner which would affect interstate commerce is limited not only by congressional action in areas constitutionally delegated to the federal government, but also by the Constitution itself.<sup>192</sup> As early as 1824,

187. See note 8 and accompanying text *supra*; notes 208-30 and accompanying text *infra*.

188. For a discussion of the text and the legislative history of § 26, see notes 59-77 and accompanying text *supra*.

189. See 29 U.S.C. § 160(a) (1976). For a discussion of *Guss*, see notes 173-82 and accompanying text *supra*.

190. See note 77 and accompanying text *supra*. For the text of § 26 of the CPSA, see note 70 *supra*. The House Report on the 1976 amendments confirms that Congress intended that federal law should preempt only where the CPSC had exercised its regulatory authority. See notes 71-72 and accompanying text *supra*.

191. See note 97 and accompanying text *supra*.

192. See, e.g., *Hunt v. Washington State Apple Ad. Comm'n*, 432 U.S. 333, 350-54 (1977) (holding invalid a North Carolina law prohibiting out-of-state apple producers from marketing their apples under the foreign state's grading system); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 370, 381 (1976) (holding invalid a state law prohibiting sale within the state of milk produced in another state unless the other state signed a reciprocity agreement); *Freeman v. Hewit*, 329 U.S. 249, 252-54, 259 (1946) (holding invalid a state tax on the interstate sales of securities having legal situs within the state). In *Freeman*, for example, the Court stated that "the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Id.* at 252 (citations omitted).



the Supreme Court acknowledged in dictum the strength of the argument that the constitutional grant to the federal government of authority over interstate commerce implied that such authority was exclusive, prohibiting the states from regulating commerce at all, regardless of whether Congress had actually enacted any corresponding legislation.<sup>193</sup> It was a full quarter-century later, however, in *Cooley v. Board of Wardens*,<sup>194</sup> that the Court first squarely addressed the question whether all state power to regulate commerce had been abrogated by the constitutional grant of the commerce power to the federal government.<sup>195</sup>

In *Cooley*, the Court reviewed a Pennsylvania statutory requirement that all ships entering and leaving the Port of Philadelphia engage a local pilot.<sup>196</sup> Although the Court expressly acknowledged that this requirement was state regulation of interstate commerce,<sup>197</sup> the Court held the pilotage requirement valid,<sup>198</sup> basing its decision

193. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) (dictum). In *Gibbons*, the Court stated:

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted.

*Id.* (dictum). For further discussion of *Gibbons*, see note 5 *supra*.

194. 53 U.S. (12 How.) 298 (1851).

195. See *id.* Between 1824, when *Gibbons* was decided, and 1851, when *Cooley* was decided, the Supreme Court had avoided articulating the limits of state power to enforce regulations which affect interstate commerce by classifying the challenged state action as either an invalid state interference with interstate commerce, see, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445-49 (1827) (holding invalid a state law prohibiting the sale of imported goods without a license) (alternative holding), or as a valid exercise of constitutionally reserved police powers of the states free of any actual conflict with federal legislation. See, e.g., *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829) (upholding a state statute authorizing the construction of a dam over a navigable stream); *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837) (upholding the validity of a state statute requiring ship masters to report the names of all persons coming into New York on board their ships). This conclusionary classification system, while reflected in the tendency of the more recent decisions to inquire into the nature of the goal allegedly served by challenged state action, really served to obscure the logic by which the Court distinguished between valid and invalid state regulation affecting interstate commerce. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-3, at 321-24 (1978).

196. 53 U.S. (12 How.) at 311-12.

197. *Id.* at 316. The Court stated as follows:

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service, performed by pilots, . . . we are brought to the conclusion, that the regulation[s] [imposed upon pilots] . . . do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

*Id.* at 315-16.

198. *Id.* at 321.

on a distinction between types of commercial subjects "quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation."<sup>199</sup> After noting that regulation of pilots in local ports had been traditionally controlled by local governments,<sup>200</sup> that such regulation had been recognized by Congress as a subject appropriate for state regulation,<sup>201</sup> and that piloting in general required the benefits of local knowledge and experience,<sup>202</sup> the Court concluded that the regulation of pilots in local ports was not a commercial subject given over exclusively to the federal government by the commerce clause.<sup>203</sup>

The *Cooley* decision established a middle course between the more extreme interpretations of the commerce clause which had previously been suggested by some members of the Court.<sup>204</sup> *Cooley* held that the constitutional grant of the commerce power prohibits some state regulation of commerce on its own force and without congressional action, but leaves other state regulation unaffected.<sup>205</sup> The *Cooley* opinion suggests dividing permissible from impermissible state regulation by characterizing the subject of regulation as either a "local" or a "national" concern.<sup>206</sup> But the decisions of the Supreme Court in the years following *Cooley* moved away from this simple dichotomy toward a more forthright examination of the nature and degree of the effect which the challenged state action would have on interstate commerce.<sup>207</sup>

199. *Id.* at 319.

200. *Id.* at 312.

201. *Id.* at 317-18, 319-20. This act permitted the states to regulate local pilots. See 53 U.S. (12 How.) at 317, 319-20.

202. 53 U.S. (12 How.) at 320.

203. *Id.* at 321.

204. On the one extreme was the position that the power to regulate commerce had been vested in Congress to the exclusion of the states, as was suggested in Chief Justice Marshall's opinion for the Court in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824), quoted at note 193 *supra*. An even more direct statement of this interpretation can be found in the dissenting opinion of Justice Story in *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 153-61 (1837) (Story, J., dissenting).

At the opposite extreme was the view that state regulation of commerce should be considered valid unless it actually conflicts with a law of Congress, as was suggested in the separate opinion of Chief Justice Taney in *The License Cases*, 46 U.S. (5 How.) 504, 578-80 (1847) (separate opinion of Taney, C.J.). See generally L. TRIBE, *supra* note 195, § 6-3, at 322.

205. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) at 319.

206. See *id.* See also L. TRIBE, *supra* note 195, § 6-4, at 324-25.

207. This development began with decisions such as *Wabash, St. L. & Pac. Ry. v. Illinois*, 118 U.S. 557 (1886), in which the Court held that a state law was invalid if it imposed a "direct," as opposed to an "indirect," burden on interstate commerce. *Id.* at 567. In *Wabash*, after analyzing the "degree of interference," the Court held invalid a state law regulating the

Although modern cases have continued to scrutinize both the ends and means of challenged state regulation, and also the effect of such regulation on interstate commerce, the emphasis as between these two concerns varies depending on the specific context. Thus, in *South Carolina State Highway Department v. Barnwell Brothers*,<sup>208</sup> the Court upheld the constitutionality of South Carolina's regulation of the size and weight of trucks using state highways.<sup>209</sup> Stressing the legitimacy of South Carolina's concerns for the safe and economical administration of state highways, the Court limited its inquiry to a determination of "whether the state . . . ha[d] acted within its province, and whether the means of regulation chosen [were] reasonably adapted to the end sought."<sup>210</sup> The Court dismissed the controversy over whether axle or wheel weight limitations or gross weight limitations were better to achieve the state's goal of highway preservation and safety, holding that it was sufficient that the measure chosen, gross weight limits, was at least rationally related to the legitimate state goal.<sup>211</sup> The Court found that the choice between different regulatory means, all rationally serving a proper state goal, was for the legislature, not the Court.<sup>212</sup> Although most of the opinion focused on the relationship between the means and the end of the state

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rates charged by railroads carrying goods through the state to other states. *Id.* at 575-77. Compare *Erb v. Morasch*, 177 U.S. 584, 585 (1900) (upholding an ordinance limiting the speed of railroad trains within city limits) and *Smith v. Alabama*, 124 U.S. 465, 482 (1888) (stating in dictum that matters including "the rate of speed at stations and through villages, towns, and cities" are within the limits of local law) with *Seaboard Airline Ry. v. Blackwell*, 244 U.S. 310, 316 (1917) (holding invalid a state law limiting the speed of railroad trains at each crossing so that the train could stop in time should any person or thing cross the track). The phrasing of such analyses was criticized as conclusionary and deceptively precise. See, e.g., *Di Santo v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting). See also, L. TRIBE, *supra* note 195, §§ 6-4 to -5, at 325-26. The test was ultimately replaced by a more openly indeterminate balancing test. See notes 208-25 and accompanying text *infra*.

208. 303 U.S. 117 (1938).

209. *Id.* at 195-96. The state law prohibited the use on state highways of trucks whose width exceeded 90 inches, and whose weight, including load, exceeded 20,000 pounds. *Id.* at 180. Truckers and interstate shippers contended, *inter alia*, that the law imposed an unconstitutional burden on commerce by arguing as follows: 1) limits on truck weight were more appropriately stated in terms of weight per axle or per wheel; 2) most other states had adopted per axle or per wheel limits which permitted use of their highways by trucks heavier than those permitted in South Carolina; and therefore, 3) a large number of interstate shippers and truckers permitted to travel in neighboring states would be foreclosed from using South Carolina highways. *Id.* at 182-84. A similar argument was made to challenge the limitation on truck width. *Id.*

The Court, however, reviewed at length testimony considered by the South Carolina legislature before enacting its law, and concluded that the legislature's choice, though questionable, was rationally related to the state's purpose of preserving the highways and promoting highway safety. *Id.* at 192-96.

210. *Id.* at 190.

211. *Id.* at 195-96.

212. *Id.* at 191-92.

regulation, the Court also emphasized that the state law did not discriminate against interstate commerce.<sup>213</sup>

Seven years later, in *Southern Pacific Co. v. Arizona ex rel. Sullivan*,<sup>214</sup> the Court expanded the *Barnwell* analysis into an explicit balancing test.<sup>215</sup> In *Southern Pacific* the State had enacted a law limiting the number of passenger or freight cars on trains within the state in order to reduce injuries from the "slack action" of long trains.<sup>216</sup> The Arizona Supreme Court had upheld the state law in terms reminiscent of *Barnwell*—i.e., since the statute was enacted under the State police power to promote health and safety, to which the limit was at least rationally related, it was valid despite its effects on interstate commerce.<sup>217</sup> On appeal, the United States Supreme Court reversed the Arizona decision, holding that the state law was an impermissible burden on interstate commerce.<sup>218</sup> The Court did not limit its inquiry to a determination of whether the statute was enacted under the state's police power to promote health and safety and whether it was rationally related to that end.<sup>219</sup> Instead, the Supreme Court maintained that the statute's validity would depend upon

whether . . . the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts.<sup>220</sup>

213. *Id.* at 185-86, 189.

214. 325 U.S. 761 (1945).

215. See text accompanying note 220 *infra*.

216. 325 U.S. at 763. In *Southern Pacific*, the State of Arizona brought suit against a railroad company to recover penalties imposed for violation of a state law which limited the length of trains operating within the state to 14 passenger cars or 70 freight cars. *Id.* The state argued that the law was a valid exercise of its police power because it was designed to alleviate the danger of accident due to "slack action" (i.e., the amount of free movement of one car before it transmits its motion to an adjoining coupled car). *Id.* at 764, 776. Although little of the evidence offered in support of the state's argument is mentioned in the opinion of the Court, Justice Black briefly reviewed in his dissent some of the findings which may have influenced the state legislature. See *id.* at 786 (Black, J., dissenting).

217. *State ex rel. Conway v. Southern Pac. Co.*, 61 Ariz. 66, 82, 145 P.2d 530, 536 (1943), *rev'd sub nom. Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945).

218. 325 U.S. at 764.

219. For a discussion of *Barnwell*, see notes 208-13 and accompanying text *supra*.

220. 325 U.S. at 775-76.

Because the Court perceived the train limit law to impose a "serious burden" on interstate commerce, requiring radical shortening of all trains passing through the state, or reconstitution of longer trains at the state border, its inquiry into the effectiveness of the law as a safety measure was far more probing and skeptical than its treatment of the analogous dispute in *Barnwell* between axle and gross weight limits.<sup>221</sup>

The balancing test of *Southern Pacific*—weighing the state interests served by the challenged state regulation against the burdens on interstate commerce imposed by such regulation—has characterized most modern decisions in which state action has been assailed as inconsistent with the commerce clause of the Constitution.<sup>222</sup> The formulation of this test most often cited and relied upon by the Court in its recent decisions<sup>223</sup> is that found in *Pike v. Bruce Church, Inc.*:<sup>224</sup>

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local

221. Compare 325 U.S. at 771-79 with 303 U.S. at 151-93. In *Southern Pacific*, the principal burden recognized by the Court was that, since most states permit longer trains, railroads which needed to run through Arizona would have to undergo the costly process of breaking up longer trains at the Arizona border and remaking the trains after leaving the state or else forego the use of longer trains altogether. 325 U.S. at 771-75. On the other hand, the Court considered the safety advantages afforded by the law to be "slight and dubious," and noted the existence of evidence that more injuries would be caused by the increased number of trains than would be avoided by the limit on the number of cars. *Id.* at 775-79.

222. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); notes 224-25 and accompanying text *infra*. See also *Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979) (relying on *Pike* in invalidating a state law which prohibited the transportation of minnows captured in state waters for sale outside of the state); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (relying on *Pike* in invalidating a state law which prohibited persons from bringing waste collected outside the state into the state for dumping); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441-42 (1978) (relying on *Pike* in invalidating a state law limiting the length of trucks on state highways); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371-72 (1976) (relying on *Pike* in invalidating a Mississippi law which prohibited the sale of milk produced in another state unless that other state reciprocally accepted milk produced in Mississippi).

223. See cases cited note 222 *supra*.

224. 397 U.S. 137 (1970). In *Pike*, the Court invalidated an Arizona state law requiring all cantaloupes grown in Arizona, or offered for sale there, to be packed in state-approved containers designed to insure that the cantaloupes were of high quality and thereby enhance the state's reputation for fine cantaloupes. *Id.* at 138, 142-43. Since a California company, which challenged the law, would therefore be unable to ship the cantaloupes uncased from Arizona to its packing facilities in California, the company would have had to build another packing facility in Arizona at a cost of approximately \$200,000. *Id.* at 140. Although the Court acknowledged that the state's interest in enhancing the reputation of its farm products was "legitimate," it found that it did not justify burdening an out-of-state company by requiring it to build a costly packing plant in Arizona. *Id.* at 145.

benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate commerce.<sup>225</sup>

Applying this analysis to the area of consumer product safety, it suggests that if a state attempts to regulate consumer product safety, the constitutionality of the state regulation would depend upon the state's ability to show the following: 1) that the regulation is designed to serve a legitimate state interest;<sup>226</sup> 2) that the regulation effectively serves the state interest without discriminating against interstate commerce;<sup>227</sup> 3) that any incidental burden imposed upon

225. *Id.* at 142 (citation omitted). Language in a recent United States Supreme Court opinion might suggest a return to the notion that legislation is constitutionally permissible if it rationally serves a legitimate state interest, at least where the legislation is designed to serve the state's interest in safety. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978). In *Raymond Motor*, the majority acknowledged "that there is language in *Barnwell Bros.* 'which read in isolation from . . . later decisions . . . , would suggest that no showing of burden on interstate commerce is sufficient to invalidate local safety regulations in the absence of some element of discrimination against interstate commerce.'" *Id.* at 443, quoting *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 528-29 (1959). The majority opinion in *Raymond Motor*, however, rejected the interpretation which reads *Barnwell* to say "that inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce." 434 U.S. at 443. But the four concurring Justices felt compelled to file a narrower, separate opinion which strongly emphasized the "illusory nature of the safety interests in this case," rather than the burden thereby imposed on interstate commerce. *Id.* at 450 (Blackmun, J., concurring). This concurring opinion warns that "if safety justifications are not illusory, the Court will not second guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Id.* This language could certainly suggest that legitimate state safety regulations are to be judged independently of issues relating to burdens on commerce. Cf. D. ENGBAHL, *CONSTITUTIONAL POWER: FEDERAL AND STATE* 292-94 (1974) (stating that the balancing test may be in flux).

On the other hand, such language might be best understood, not as a repudiation of the concept of weighing the burdens on interstate commerce, but rather as a reaction against the willingness of some courts to undertake clearly legislative functions, such as by resolving conflicts in evidence presented to the state legislature. See *Brotherhood of Locomotive Firemen & Engineermen v. Chicago, R.I. & Pac. R.R.*, 393 U.S. 129, 136 (1968); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 784 (1945) (Black, J., dissenting). Indeed, this language might be interpreted to indicate that state safety interests weigh *very* heavily in determining whether such regulation unduly burdens commerce. See cases cited note 229 *infra*.

Nonetheless, the *Raymond Motor* concurrence suggests that some of the Justices may be leaning towards significantly narrowing the negative implications of the commerce clause. This possibility may explain the willingness of Congress to attempt explicit resolution of federalism issues in federal legislation, as in section 26 of the CPSA. Such detailed preemption language is rare in federal legislation. For another recent example, see the Hazardous Materials Transportation Act, 490 U.S.C. § 1811 (1976). For a discussion of this act and related legislation, see Frye, *Recent Developments in the Transportation of Hazardous Materials*, 10 *TRANSP. L.J.* 97, 119-20 (1978).

226. See *Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

227. See *Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617, 626-29 (1978); *Hunt v. Washington State Apple Ad. Comm'n*, 432 U.S. 333, 351-54 (1977).

interstate commerce by the regulation does not outweigh the benefits of the regulation;<sup>228</sup> and 4) that there are no less burdensome, non-discriminatory alternatives available.<sup>229</sup>

The first element, a legitimate state interest, may be satisfied by emphasizing that the public health and safety are the goals toward which state consumer product safety regulation is directed. In commerce clause litigation, the Court has shown a special tolerance for state regulation serving to protect health and safety, not only because these goals have traditionally been included in the "police powers" reserved to the states,<sup>230</sup> but also because any court would hesitate to find health and safety less important than the financial burdens resulting from interference with interstate commerce.<sup>231</sup>

But the mere fact that a state couches its legislative purpose in terms of health and safety will not necessarily immunize a statute from challenge under the commerce clause. Where the health or safety purpose of challenged legislation merely supplements an improper motive, such as economic discrimination against out-of-state enterprise, the legislation is unconstitutional.<sup>232</sup> Further, if the

228. See *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444-47 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145-46 (1970).

229. *Hughes v. Oklahoma*, 441 U.S. 332, 336-38 (1979); *Hunt v. Washington State Apple Ad. Comm'n*, 432 U.S. 333, 354 (1977); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-56 (1951).

230. See, e.g., *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960). The Court's deference to state safety regulations was also emphasized in both the majority and concurring opinions in *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978). Although the Court held invalid the state law limiting the length of trucks using state highways, *id.* at 447-48, the opinion of the court acknowledged that "it also is true that the Court has been most reluctant to invalidate under the Commerce Clause 'state legislation in the field of safety where the propriety of local regulation has long been recognized.'" *Id.* at 443, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. at 143, quoting *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. at 796 (Douglas, J., dissenting). See note 225 *supra*.

231. See *Brotherhood of Locomotive Firemen & Engineermen v. Chicago, R.I. & Pac. R.R.*, 393 U.S. 129, 139-40 (1968). In *Brotherhood of Locomotive Firemen*, the Supreme Court reversed the decision of the district court and upheld the constitutionality of a state law specifying a minimum number of crew members to be carried by a train. *Id.* at 144. In so doing, the Court stated that it was improper for

the District Court to place a value on the additional safety [fostered by the challenged state legislation] in terms of dollars and cents, in order to see whether this value, as calculated by the court, exceeded the financial cost to the railroads. . . . It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highways.

*Id.* at 139-40. See also note 230 *supra*.

232. See notes 227-229 and accompanying text *supra*. An early expression of this limitation is found in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), where the Supreme Court struck down New York legislation prohibiting sales of milk produced outside New York and purchased by the retailer at below the minimum price set for similar purchases within New York. *Id.* at 519, 527-28. The state had argued that the regulation of milk prices was designed to assure an "adequate supply of pure and wholesome milk" and, thus, "to make its inhabitants healthy" not "rich." *Id.* at 523. Justice Cardozo's opinion expressed the policy supporting the rule against discriminatory legislation: "The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together." *Id.*

safety or health goal targeted by the challenged state legislation is ineffectively promoted by such legislation, this can hardly justify a material impediment to interstate commerce.<sup>233</sup> Finally, even where a health or safety goal is the primary purpose of state regulation, and is effectively served, the measure may be vulnerable to attack on the ground that a less burdensome approach is possible.<sup>234</sup>

Some state regulation of consumer product safety is, therefore, clearly permitted under the commerce clause of the Federal Constitution, but the validity of a particular state regulation will depend upon the skill with which it is designed. Any state action in this area will be most easily defended against constitutional attack if the measures enacted serve only genuine safety goals,<sup>235</sup> and serve such goals efficiently.<sup>236</sup> Efficiency can be shown by empirical data establishing both 1) that a safety hazard arising from use of the regulated product exists, and 2) that the hazard will be ameliorated by the state's chosen means of regulation. For example, if a state were to attempt regulation of a product risk by requiring that certain minimum information be included on the label, the measure would be more easily defended if the state could demonstrate that the purchasers or consumers of the product were likely to be literate (not small children) and likely to consult the label at the time of purchase or consumption. Similarly, if the state wished to require safety caps for poisonous products, such a regulation would be supported by evidence that the caps work, thereby countering anecdotal observations that consumers of safety-capped products often leave the product uncapped to avoid the inconvenience of having to struggle to open the container.

In designing a consumer product safety regulation, the state government should investigate the likely impact of the regulation on interstate commerce.<sup>237</sup> Costs that manufacturers and distributors will

233. See notes 228 & 229 and accompanying text *supra*; *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945).

The *Raymond Motor* Court repeatedly emphasized the failure of the state to provide evidence showing that the state law served the state's asserted goal. See 434 U.S. at 437-38, 444-45, 447-48. In *Southern Pacific*, it appears that the safety of trains longer than those permitted by the contested statute was likewise "unchallenged." 325 U.S. at 773. See also *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 525 (1959) (in invalidating an Illinois statute requiring contour mudguards, the Court noted evidence of the regulation's ineffectiveness). For a discussion of another aspect of *Raymond Motor*, see note 230 *supra*. For a discussion of *Southern Pacific*, see notes 214-21 and accompanying text *supra*.

234. See note 229 and accompanying text *supra*.

235. See notes 226 & 230-31 and accompanying text *supra*.

236. See notes 228 & 233 and accompanying text *supra*.

237. See notes 225 & 228 and accompanying text *supra*.



have to bear as a result of the regulation should be thoroughly evaluated with an eye toward minimizing such burdens, if possible, while still providing the protection sought. Other states' actual or proposed regulations of the same products should also be surveyed, since a burden which is otherwise reasonable could be judged intolerable if a nationally distributed product would encounter mutually inconsistent regulations in several states.<sup>238</sup>

#### IV. CONCLUSION

Despite the extensive preemptive language of section 26 of the Consumer Product Safety Act,<sup>239</sup> there is still a broad area of regulatory action open to state governments. The explicit limitations of section 26 of the CPSA make it inapplicable to state regulation of product risks not yet the subject of CPSC safety standards.<sup>240</sup> As to such product risks, state safety standards will most likely be upheld as consistent with the federal legislation and valid under the commerce clause of the Constitution if the regulation has been properly designed to affect only legitimate health or safety risks,<sup>241</sup> to ameliorate those risks efficiently,<sup>242</sup> and to burden commerce as little as possible while achieving the targeted health and safety goals.<sup>243</sup> State laws banning a product altogether are unaffected by the federal legislation.<sup>244</sup>

Such regulation not only requires careful investigation and analysis, but probably also necessitates documentation of the care with which the adopted regulatory design was chosen.<sup>245</sup> Where extensive research data are unavailable, state officials should at least be prepared to provide some coherent reasoning to support the mode of regulation adopted. In theory, this approach involves little more than sound legislative or administrative methods. In practice, however, some state officials may be hesitant or unable to build elaborate foundations for their regulatory decisions. Whether less carefully conceived state regulation stems from inadequate staffing or funding of

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238. See, e.g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-28, 529-30 (1959) (Illinois law required trucks to use contour mudguards; other states required conventional mudguards; law held invalid because of the burden on commerce imposed by the conflicting requirements).

239. For the text of § 26 of the CPSA, see note 70 *supra*.

240. See notes 188-91 and accompanying text *supra*.

241. See notes 227 & 230-31 and accompanying text *supra*.

242. See notes 229 & 232-33 and accompanying text *supra*.

243. See notes 228-29 & 234 and accompanying text *supra*.

244. See note 82 and accompanying text *supra*.

245. See notes 235-38 and accompanying text *supra*.

state government, from pro- or anti-business biases on the part of state officials, or from other sources, regulation not founded upon careful research and analysis may be vulnerable to attack under the commerce clause of the Constitution.<sup>246</sup>

Once the CPSC promulgates a safety standard regarding any product risk, however, state regulatory authority becomes subject to the detailed limitations of section 26.<sup>247</sup> An activist Commission could thus narrow the realm of permissible state regulation in this field. Nevertheless, with so many potential targets for regulation, even a highly activist Commission could not develop safety standards for a majority of the product risks addressable under the CPSA without years of additional investigation and analysis. Furthermore, if and when the Commission seeks to regulate product risks not previously regulated by the federal government, states can participate in the development of the new federal standards.<sup>248</sup> This statutorily sanctioned participation will, of course, be most persuasive where offered by a state government with a history of effective regulation.

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246. See notes 192-238 and accompanying text *supra*.

247. See notes 82-91 and accompanying text *supra*.

248. See note 44 and accompanying text *supra*.